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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

92-6455

* * * * * * * * * * * * * *

JERRY WAYNE SEWELL, II,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

* * * * * * * * * * * * * *

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES JERRY WAYNE SEWELL, II, Petitioner, by and through his attorney of record, LINDA C. CANSLER, and files this his motion for leave of court to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner would show unto the Court that the United States District Court for the Eastern District of Texas, Beaumont Division, duly appointed LINDA C. CANSLER as his counsel of record under the Criminal Justice Act of 1964, as amended, 18 U.S.C. Section 3006A(d)(6), as shown by the attached Exhibit A.

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SUPREME COURT, U.S.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this honorable Court permit Petitioner to proceed in forma pauperis in this cause.

Respectfully submitted,

Linda C. Cansler

LINDA C. CANSLER
Attorney of Record for
Jerry Wayne Sewell, II

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion For Leave to Proceed In Forma Pauperis has been furnished to the Hon. James O. Jenkins, Assistant United States Attorney, and to the Hon. Mervyn Hamburg, c/o U.S. Dept. of Justice, Washington, D.C. by U.S. Mail on this 30th day of October, 1992.

Linda C. Cansler

LINDA C. CANSLER

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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JERRY WAYNE SEWELL, II,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

* * * * * * * * * * *

Petition for Writ of Certiorari to
United States Court of Appeals
For the Fifth Circuit

* * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI OF JERRY WAYNE SEWELL, II

* * * * * * * * * * *

Linda C. Cansler
P. O. Box 693
Beaumont, Texas 77704-0693
(409) 835-5920

ATTORNEY OF RECORD FOR
PETITIONER, JERRY WAYNE
SEWELL, II

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court erred in denying Defendant-Petitioner, Jerry Wayne Sewell, II's, Motion for Judgment of Acquittal and Motion for New Trial because there was insufficient evidence to convict him.

2. Whether the Government's use of and reliance on unacceptable tactics of law enforcement personnel and carelessness with and destruction of evidence constituted outrageous Government conduct and denied Defendant-Petitioner, Jerry Wayne Sewell, II his constitutional right to due process of law under the Fifth Amendment and to confrontation of his accusers under the Sixth Amendment.

3. Whether the District Court erred in finding the quantity of methamphetamine applicable to be 17.5 kilograms to determine the base offense level under the United States Sentencing Guidelines because the District Court included unusable waste material in determining the weight of the mixture.

4. Whether a man should be convicted, sentenced and imprisoned because of goop that looks like a failed batch of mudpie fudge.

LIST OF ALL PARTIES TO PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed is as follows:

United States of America- - - - - - - - - -Plaintiff-Respondent

Jerry Wayne Sewell, II- - - - - - - - - - - -Defendant-Petitioner

Lonnie Jerrell Cooper- - - - - - - - - - - - - - - - - - -Defendant

James Edwin Sherrod- - - - - - - - - - - - - - - - - - -Defendant

Steven Lee Sherrod- - - - - - - - - - - - - - - - - - - -Defendant

Jerry Wayne Sewell, Sr.- - - - - - - - - - - - - - - - - Defendant

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2. Government's Motion For Authorization to Dispose of Chemicals, and Order (March 11, 1989) (Government Exhibit No. 81)
3. Uniform Hazardous Waste Manifest (Defendant's Exhibit No. 8)
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6. Clandestine Laboratory Report (Defendant's Exhibit No. 11)

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NO. _____

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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

* * * * * * * * * * *

OCTOBER TERM, 1992

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JERRY WAYNE SEWELL, II,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

* * * * * * * * * * *

Petition for Writ of Certiorari to
United States Court of Appeals
For the Fifth Circuit

* * * * * * * * * * *

Petitioner, Jerry Wayne Sewell, II, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming the conviction and sentence of the Defendant-Petitioner, Jerry Wayne Sewell, II, based upon insufficient evidence and materially unreliable information determining the relevant quantity of methamphetamine constituting outrageous government conduct, in violation of the Defendant-Petitioner's constitutional right of due process and right to confront his accusers.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in United States v. Sherrod, 964 F.2d 1501 (5th Cir. 1992) and appears in Appendix A to this Petition. The unpublished denial of Defendant-Petitioner's Petition for Rehearing was filed on August 3, 1992 and appears in Appendix B. The judgment of conviction and sentence of the United States District Court for the Eastern District of Texas, Beaumont Division, appears in Appendix C to this Petition.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on June 23, 1992. A timely Petition for Rehearing was filed on July 6, 1992, by, Defendant-Petitioner, Jerry Wayne Sewell, II and Jerry Wayne Sewell, Sr. The Court of Appeals' denial of the Petitions for Rehearing was issued on August 3, 1992. The Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 1254(1);

(2) The decision of the Fifth Circuit Court of Appeals is in conflict with the decisions of other United States Courts of Appeals on the same matter, to wit:

A. United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991), and United States v. Acosta, 963 F.2d 551 (2nd Cir. May 1992), which hold that the term "mixture" used in the United States Sentencing Guidelines Section 2D1.1 does not include unusable waste mixtures of controlled substances.

B. United States v. Perrone, 936 F.2d 1403 (2nd Cir. 1991), and United States v. De Noia, 451 F.2d 979 (2nd Cir. 1991), which hold that where the acts of a

defendant in a narcotics conspiracy case are minimal, there must be independent evidence tending to prove the defendant had some knowledge of the broader conspiracy.

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in Chapman v. United States, 500 U.S. _____, 111 S.Ct. 1919 (1991).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"No person shall be ... deprived of life, liberty, or property, without due process of law..."

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES SENTENCING GUIDELINES--PART D--

OFFENSES INVOLVING DRUGS

"Section 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

(a) Base Offense Level (Apply the greatest);

* * *

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* * *

* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the enitre mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater."

STATEMENT OF THE CASE

The United States District Court, Eastern District of Texas, Beaumont Division, had jurisdiction pursuant to Title 18, U.S.C. § 3231.

The case began as a local Calcasieu Parish, Louisiana investigation. Danny Johnson, a dope-snorting, snitching pimp, became an informant for the Calcasieu Parish Sheriff's Office, working with a paid "undercover agent", Will Abshire, who was not a commissioned law enforcement officer for the Calcasieu Parish Sheriff's Department. Danny Johnson approached Will Abshire to become an informant to work off some drug charges pending against him in Calcasieu Parish.

Danny Johnson met with Will Abshire and John Fryar, Chief of Detectives at the Calcasieu Parish Sheriff's Office on January 23, 1989, and agreed to provide information and assist in investigations of people in narcotics trafficking. The plan that evolved was that Danny Johnson was to approach Jerry Wayne Sewell to involve him in a "drug deal". Jerry Wayne Sewell is the father of Defendant-Petitioner, Jerry Wayne Sewell, II.

Danny Johnson eventually, through Jerry Wayne Sewell, involved others in his "drug deal". He was monitored by members of the Calcasieu Parish Sheriff's Office with body wires taping conversations and by physical surveillance as he traveled from Lake Charles to Vinton, Louisiana, and up to Bells, Texas and returned to Louisiana before eventually arriving at the clandestine lab site near Orange, Texas.

The only involvement of Defendant-Petitioner, Jerry Wayne Sewell, II in the many hours and great distances covered which were catalogued in testimony concerning the alleged conspiracy was that he happened to be at his father's trailer in Bells, Texas, in March, 1989. Further, no testimony or evidence ever placed Jerry Wayne Sewell, II anywhere near the clandestine lab at the Hill property near Orange, Texas.

Danny Johnson had traveled up to Bells, Texas, to meet with Jerry Wayne Sewell and on March 7 - 8, 1989, was present at the trailer where Jerry Wayne Sewell lived. Defendant-Petitioner, Jerry Wayne Sewell, II was also present at that trailer for brief periods. Also present were other defendants. Danny Johnson referred to the presence of Jerry Wayne Sewell, II differently from others who were continually present. Jerry Wayne Sewell, II was "in and out", "back and forth".

Some defendants went to Kemp, Oklahoma to pick up James Sherrod.

On March 8, 1989, several defendants drove down from Bells, Texas, near the Oklahoma border to the clandestine lab site near Orange, Texas. Defendant-Petitioner did not make that trip, and no testimony put Jerry Wayne Sewell, II far from his father's home, and certainly not on any of the "trips", whether up to Kemp, Oklahoma, or to Dallas, Texas, or to Orange, Texas, with the group, or even to rush down extra equipment to the lab when it was needed, as Darlene Roznovsky rushed down. There were no statements, no conversations, no participation in activities, no voluntary acts, no overt acts of any sort by Jerry Wayne Sewell, II to help out any of the people

assembled at his father's house in any kind of drug endeavor, although there was inconsistent testimony about Defendant-Petitioner's carrying boxes with lab equipment and chemicals.

The undercover informant, Danny Johnson, admitted taking dope on the trip up to Bells and back, doing "bumps".

On March 11, 1989, various Federal and State law enforcement personnel executed a federal search warrant at the premises owned by the Defendant, Danny Gene Hill. According to DEA Special Agent Milton Shoquist, they found a clandestine laboratory in operation inside an old school bus on the property. DEA Chemist George Lester was also present during the execution of the search warrant. Once the premises were secured, Lester proceeded inside the bus to observe and dismantle whatever laboratory equipment was there. Once inside Lester observed the chemical reactions taking place.

He observed a chemical reaction taking place in a three-neck round bottom flask. He also observed a liquid substance in a large pan and a coke canister, which he believed to be a reaction for synthesis of methamphetamine. Lester then took samples of the various substances and chemicals in the bus.

Once the samples had been taken, the balance of the chemicals and substances were destroyed pursuant to DEA policy. At the time the search warrant had been obtained, the DEA agents also requested a destruction order for any chemicals deemed to be harzardous or toxic. The U.S. Attorney has some input and discretion as to whether or not in a particular case the Government ought to destroy something, and in this particular case, filed a motion with the magistrate before the search warrant was executed, seeking the destruction order. Appendix, Jerry Wayne Sewell, II, H-1. The glassware and other contaminated utensils, such as the coke canister and serving pan

were likewise broken and disposed of. The destruction order which was obtained in this case provided that the chemicals could be destroyed "provided that photographs are taken of the containers and chemicals prior to the destruction". Some still photographs were taken at the site, and also a video, although for most of the video footage, it was not in focus. The substances inside glass containers can be seen to some extent in the Government's still photographs and video footage, but importantly no photograph apparently was taken which shows chemicals or any other substance inside any coke canister. Apparently, destruction occured which was not authorized by prior order. Further, although the order gave the DEA the authority to destroy the chemicals, it did not give them the authority to destroy the containers; the decision to destroy the containers was made by DEA agent Shoquist and the chemist.

According to Milton Shoquist, the Government contracted with Disposal Services, Inc. to dispose of the chemicals. According to the Hazardous Waste Manifest, 1.25 gallons of suspected methamphetamine was disposed of. Defendant's Trial Exhibit 8, Appendix, Jerry Wayne Sewell, II, H-6. The quantity reflected in the Hazardous Waste Mainfest, 1.25 gallons, computes to 4.73 kilograms.

Defendant-Petitioner and others were charged in a two-count indictment on March 14, 1989. Defendant-Petitioner was arrested on March 21, 1989. On May 18, 1989, the Government indicted Defendant-Petitioner and eight others in a superseding indictment containing three counts, two of which contained enchanced penalty provisions.

Four of the co-defendants entered into plea agreements with the Government, and the remaining five defendants, including Defendant-Petitioner, Jerry Wayne Sewell, II, went to trial on October 2, 1989, with pre-trial hearings and jury selection. Testimony in the trial began October 16, 1989.

In pre-trial discovery, hearings on motions, responses to various defendants' motions and at other defendants' Plea Hearings, the Government consistently represented that the total amount of substances containing methamphetamine was approximately 4.5 kilograms, but at the trial of Defendant-Petitioner and his co-defendants, Lester testified that approimately 17.5 kilograms of methamphetamine was at the lab site, and was seized and destroyed. The increase from 4.5 kilograms to 17.5 kilograms increases the base offense level for sentencing purposes under the United States Sentencing Guidelines.

After the samples of the various substances were taken, the DEA chemist analyzed the samples. According to Lester, the substance found in the triple neck flask contained Phenylacetone (P2P). A substance taken from a 1000 milliliter separatory funnel was also found to contain P2P. At Defendant Hill's Plea Hearing, the Government proffered that the evidence would show that there was a total of 4750 milliliters of P2P. At the trial of Defendant-Petitioner and his co-defendants, Lester testified that the sample taken from the pan was found to be methamphetamine, while the coke canister and quart mason jar contained detectable amounts of methamphetamine in combination with P2P.

With regard to quantity, Lester testified that at the time of the execution of the search warrant on March 11, 1989, he estimated the substance in the pan to be about 2000 milliliters. However, prior to trial, Lester was given some measurements supposedly made of the pan before it was destroyed, and based on the dimensions of the pan came up with a new estimate of 6 kilograms. With regard to the coke canister, which was allegedly half full, Lester testified that at the scene he estimated that it contained 2 kilograms of substance. At the scene, he estimated the coke canister to have a total volume capacity of four kilograms. Shoquist testified that on the morning

of his trial testimony he obtained a "like" coke canister from the Coca-Cola Bottling Company in Beaumont and determined the total volume to be twenty-two (22) liters. He determined this by using a two liter measuring pitcher, and pouring water into the canister until it was full. Based on Shoquist's measuring of a "like" coke canister, Lester changed his initial on the scene estimate from 2 kilograms to 11 kilograms. With the 500 milliliters of liquid containing methamphetamine in the quart jar, Lester changed his initial total estimate for methamphetamine from 4.5 kilograms to 17.5 kilograms. Lester acknowledged that there was no DEA guidelines to follow with respect to determining the volume of substances; they just make approximate estimates of the measurements. Although Lester testified that they do not take any scales or containers for measuring substances, Dennis Dorsey, one of the government agents involved in executing the search warrant, testified that he observed Shoquist and another person remove the coke canister from the lab, and try to determine the amount inside the canister by pouring liquid into a big measuring cup. Government Trial Exhibits 18 and 19, admitted at trial of Defendant-Petitioner and his co-defendants, show a large pyrex measuring cup. The same cup, and two additional large measuring cups, are shown in Government Trial Exhibit 4, a video of the lab scene. Additionally, Government Trial Exhibit number 26 shows a scales, also listed in items seized (item no. 8 in a list attached to the return of the search warrant, Government Trial Exhibit number 3, Appendix, Jerry Wayne Sewell, II, H-1). In items 1-7, in that same attachment of Government Trial Exhibit number 3, approximate amounts of suspected controlled substances are given. Sufficient measuring devices were at the lab for DEA chemist Lester to use.

The DEA-7 reports prepared on March 13, 1989, stated the quantity of methamphetamine totaled 4.5 kilograms. Appendix, Jerry Wayne Sewell, II, H-5.

Further Defendant's Trial Exhibit 11, introduced at the trial, is a DEA Clandestine Laboratory Report prepared by the DEA chemist, George Lester. Appendix, Jerry Wayne Sewell, II, H-6. According to Lester, this report set forth the production capabilities of the laboratory in question. As he testified, based on his Clandestine Laboratory Report, the lab had a production capability of 1500 grams (1.5 kilograms) of methamphetamine. The quantity in the pan was actually inflated because Defendant Hill added salt water to it. Hill added the salt water because he believed he had been unsuccessful in making methamphetamine.

The testimony at trial, as described by Government witnesses such as Danny Johnson, Will Abshire, Darlene Roznovsky and Lisa Erwin- revealed that the only quantity referred to in the conspiracy was one pound of methamphetamine.

On November 15, 1989, the jury found all defendants guilty on all counts of the Superseding Indictment.

On June 18, 1990, the District Court sentenced Defendant-Petitioner to sixty (60) months to each counts I, II and III of the Supersedirg indictment, with the term of confinement to run concurrently. After the term of sixty (60) months, there will be a supervised release for a term of five (5) years with several conditions. A special assessment of $50.00 was ordered on each count for a total of $150.00.

Defendant-Petitioner, Jerry Wayne Sewell, II gave notice of appeal on June 22, 1990, and thereafter perfected appeal to the Fifth Circuit Court of Appeals. That court, on June 23, 1992, affirmed the conviction and sentence of all five defendants in United States v. Sherrod, 964 F.2d 1501 (5th Cir. 1992). Defendant-Petitioner on July 6, 1992, timely filed a Petition for Rehearing, which was denied on August 3, 1992, and is set forth in Appendix B.

ARGUMENT

A. Outrageous Government Conduct.

In United States v. Russell, 411 U.S. 423 (1973), Justice (now Chief Justice) William Rehnquist acknowledged that:

> **[We] may some day be presented with a situation in which the conduct of law enforcement agenst is so outrageous that due process would be absolutely bar the Government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952) . . . . Russell, at 431.**

The Rochin Rule is an independent due process-based rule. It arose from conduct of law enforcement personnel that "shocked the conscience", when an accused in custody endured forced stomachpumping which caused him to vomit up narcotics he had swallowed. Jerry Wayne Sewell, II's invocation of the Rochin Rule to afford him relief does not state that any physical mistreatment or abuse occurred at all. Rather, Jerry Wayne Sewell, II urges that the behavior of law enforcement personnel and government agents and the use of the results of that behavior by the Government at trial "shocks the conscience", and has denied him a "fundamentally fair" trial.

When the Government accuses someone of violating a statute of the United States, it is expected that the Government has conducted and will conduct all proceedings according to law and accepted standards so as to ensure a citizen accused will not be denied his rights under the law. The Government is not an ordinary party to a controversy.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one...."(underlining added).

Berger v. U.S., 295 U.S. 78, 88 (1935).

The following is a non-exhaustive listing of examples of the government's failure to reach an acceptable standard of conduct in this case with regard to Defendant-Petitioner, Jerry Wayne Sewell, II:

1) The Calcasieu Parish Sheriff's Department set an informant with questionable motives (Danny Johnson wanted to work off some cases) loose on the world;

2) Danny Johnson was working with a paid "professional undercover agent," Will Abshire, who was not a commissioned law enforcement officer in the Calcasieu Parish Sheriff's Department;

3) Danny Johnson used dope while he was involved in the surveillance of and contact with the defendants;

4) Will Abshire destroyed his notes;

5) The government used Danny Johnson's uncorroborated testimony against Jerry Wayne Sewell, II at trial (his testimony against other defendants was confirmed by wire or by personal observation by others);

6) The government relied on extrinsic offense evidence against Jerry Wayne Sewell, II that was remote in time;

7) The Calcasieu Parish Sheriff's Department sent men over the river into Texas in a vigilante type endeavor where they traveled the entire length of eastern Texas;

8) There was unauthorized destruction of containers, materials and lab equipment;

9) Failure to obtain photographs of all substances destroyed (i.e. the contents of both metal canisters);

10) Failure to obtain accurate measurements of destroyed substances when measuring devices were available;

11) The failure of DEA agents to take measuring devices with them to the clandestine lab site;

12) Failure of DEA agents to use the measuring devices that were at the clandestine lab;

13) The use of guestimates by DEA agents of substances when the Sentencing Guidelines require exactitude;

14) Lester saying he took no measuring devices to the lab but basing a later higher estimate of contents of the pan on "measurements" made of the pan;

15) Lester ignoring the fact that the pan was not "square" but "irregular" with a rounded bottom and a lip around the edge;

16) There can be no substitute to the destroyed evidence, substance and containers when it is unknown what had to be substituted;

17) There can be no effective confrontation of witnesses when the evidence has been destroyed because there can not be effective cross-examination of the witnesses;

18) The government's acceptance of, reliance on and use of the above list and more had the cumulative effect of denying Defendant-Petitioner of his right to a fundamentally fair trial and "shocks the conscience" of people with ordinary sensibilities.

It is consideration of the Due Process Clause of the Fifth Amendment which requires this Court to reverse the conviction and sentence of Jerry Wayne Sewell, II because the Due Process Clause of the Fifth Amendment

> "inescapably imposes upon this Court an exercise of Judgment upon the whole course of proceeding [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

Rochin, at 169. In drug cases, the day foreseen in Russell has apparently arrived: the Government must be barred from using the kind of conduct displayed in this case.

B. Sentencing Guidelines

One of the main purposes of the United States Sentencing Guidelines is "to eliminate disparity in sentencing." Chapman v. United States, 500 U.S. _____, 111 S.Ct. 1919 (1991). Under 21 U.S.C. Section 841(b) the penalty range for the offenses for which Defendant-Petitioner was convicted was determined by the quantity of the controlled substances involved. Also, quantity of controlled substances determined the base offense level for sentencing purposes under Section 2D1.1 of the Sentencing Guidelines. The Sentencing Guidelines were effective November 1, 1987.

1) DEA Agent Milton Shoquist and DEA Chemist George Lester entered the speed lab on Danny Gene Hill's property near Orange, Texas, on March 11, 1989. Surely the period from November 1, 1987 to March 11, 1989 would be a sufficient period of time for DEA operatives to realize some degree of accuracy in measuring substances and determining the content of substances found would be required if defendants accused of drug offense were to have any semblance of a fair trial. However, what occurred when the DEA occupied the lab site stands as a monument to agency carelessness, sloppiness and deliberate disregard for the law.

By his own admission, DEA chemist took no measuring devices to the lab site and did not make use of the equipment present at the lab (three measuring cups, a 5,000 milliliter glass flask, and a Ohaus triple beam balance scale, Appendix, Jerry Wayne Sewell, II, H - 1) Nevertheless, the chemist made guestimates of substances and completed DEA Form 7, Report of Drug Property Seized. Appendix, Jerry Wayne Sewell, II, H-5. The chemist changed his guestimates of amounts of controlled

substances and testified in trial that there were 17.5 kilograms of a substance containing methamphetamine. This new "calculation" of 17.5 kilograms is not consistent with independent evidence. The Uniform Hazardous Waste Manifest prepared by Disposal Systems, Inc., a company independent of the DEA, showed 1.25 gallons (4.73 kilograms) of suspected controlled substance. (Defense Trial Exhibit No. 8, Appendix, Jerry Wayne Sewell, II, H - 3) Also, a video taken of the lab scene (Government Trial Exhibit No. 4) shows two metal canisters, neither of which is transparent to show the amount of substance inside for a guestimate by DEA Chemist Lester.

In the face of such a lack of attention to detail by government investigators in securing evidence and the reliance of the government on that "unreliable" evidence at trial for conviction and sentencing of Defendant-Petitioner, how could the District Court have sentenced Defendant-Petitioner fairly under the Sentencing Guidelines? "Society...suffers when any accused is treated unfairly...." Brady v. Maryland, 373 U.S. 83 (1963).

2) Unusable Liquid Waste By-Products

There is conflict among the Circuits of the Courts of Appeal with respect to determining what constitutes a "mixture or substance containing a detectable amount" of a controlled substance for purposes of sentencing under the Sentencing Guidelines. Even before this Court's decision in Chapman v. United States, 500 U.S. _____, 111 S.Ct. 1919 (1991), the Fifth Circuit had previously considered this issue of unusable liquid waste by-products from the process of manufacturing methamphetamine, see United States v. Mueller, 902 F.2d 336 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989) cert. denied, _____ U.S. _____, 111 S.Ct. 82 (1990); see United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 493 U.S. 983 (1989). After the Chapman case, the Fifth Circuit decided a case, United States v. Walker, 960 F.2d

409 (5th Cir. 1992), in which that court considered the use of liquid waste in determining the total weight of a substance in calculating base offense levels under the Sentencing Guidelines. In Walker, the Fifth Circuit distinguished Chapman because "Chapman did not involve methamphetamine; nor did it involve a liquid. Hence, the Court did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as a basis for computing a defendant's offense level." U.S. v. Walker, 960 F.2d 409, 412 (1992). However, the Walker court felt that the language in Chapman supported its earlier decision in Baker.

The Walker court's decision, and its decision in Sherrod, however, ignore the market-based approach of Chapman in resolving issues under section 2D1.1 of the Sentencing Guidelines. Chapman apparently derived its market-based approach from consideration of the legislative intent of Congress to adopt "a market oriented approach to punishing drug trafficking." Chapman, at 114 L.Ed. 2d, at 535. The Fifth Circuit will continue to find that the total weight of a liquid substance containing methamphetamine should be used to calculate a defendant's base offense level because that court "has consistently rejected arguments," Walker, at 412, not to use the total weight. One panel of the Fifth Circuit may not overrule the decision of a prior panel "in the absence of an en banc reconsideration or superseding decision of the Supreme Court." Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991) Chapman has come, but the Fifth Circuit does not consider Chapman a superseding decision because the Fifth Circuit has distinguished Chapman from the facts in Walker and Sherrod.

Two other circuits agree with the Fifth Circuit: the Tenth Circuit in United States v. Fowner, 947 F.2d 954 (10th Cir. 1991), cert. denied, _____ U.S. _____, 112 S.Ct. 1998 (May 18, 1992) and the First Circuit in United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991).

The Fifth, First and Tenth Circuits are in conflict with other Circuits' decisions on this issue of using total weight (including non-marketable, unusable, possibly toxic, and harmful matter) of a substance containing a controlled substance to determine base offense levels for sentencing purposes. United States v. Jennings, 945 F.2d 129 (6th Cir. 1991); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); and United States v. Acosta, 963 F.2d 551 (2d Cir. 1992).

The Court in Jennings based its decision on the legislative intent of Congress as explained in Chapman. Jennings, at 137. Poisonous unreacted chemicals and by-products would not be distributed on the market. Supposedly, in this case, the substances found at the lab site were destroyed because they were toxic. In a Jennings court, a different base offense level would have resulted for the defendants. Further, a Jennings court apparently would not have wanted to punish the defendants in this case for a weight of substance greater than the production capacity of the lab. Id, at 136. The chemist Lester stated that the production capacity of the lab in this case was 1.5 kilograms, a far distance from 17.5 kilograms.

The Court in Rolande-Gabriel felt it was "fundamentally absurd to give...a more severe sentence for a mixture which is unusable... (when) usuable mixtures would receive far less severe sentences..." 938 F.2d at 1237. The Rolande-Gabriel Court would not have used the entire weight as the Fifth Circuit did in this case.

Finally, the Court in Acosta concluded that the "unusable portion of a mixture which makes the drugs uningestable and unmarketable," Id, at 553, should not be included in the overall weight calculation of a substance to determine the base offense level under the Sentencing Guidelines. Id. In reaching the decision in Acosta, the Second Circuit relied on Chapman. Clearly, the Circuit Courts of Appeals are using this Court's opinion in Chapman to reach different results in similar fact situations. A defendant's fate should not be determined by mere geography.

C. Insufficient Evidence

In the factual background section of the opinion of the Fifth Circuit in this case, Defendant-Petitioner, Jerry Wayne Sewell, II, is mentioned only twice. Sherrod, at 1503. In the Denial of Petitions for Rehearing, the Fifth Circuit acknowledged Defendant-Petitioner's case was a close one, Opinion on Petitions for Rehearing (5th Cir. Aug, 3, 1992) at 15, Appendix, Jerry Wayne Sewell, II, B, but in applying a standard review from this Court in Glasser v. United States, 315 U.S. 60 (1942), where the evidence must be viewed in the light most favorable to the Government to determine whether the Government proved the requisite elements of the crime beyond a reasonable doubt, the Fifth Circuit considered the elements of a drug conspiracy: 1) the existence of an agreement, 2) defendant's knowledge of the agreement, and 3) the defendant's voluntary participation in the agreement. Defendant-Petitioner has not challenged the existence of some kind of agreement but has never been sure what it was. (Other defendants have claimed it was a conspiracy to manufacture amphetamine.) What he does contest is the sufficiency of evidence brought to show his knowledge of an agreement to manufacture controlled substances and his voluntary participation in that agreement.

The record does not indicate that Jerry Wayne Sewell, II was a party to any of the conversations concerning the conspiracy for which he was convicted. A careful review of the record will also show that Jerry Wayne Sewell, II did not participate in any "drug conversations". Even though Jerry Wayne Sewell, II did spend the night at his father's residence, not even the government informant, Danny Johnson, could indicate for certain that Jerry Wayne Sewell, II was a participant in any of the conversations that would indicate that he knew about the conspiracy and agreed to join it. Danny Johnson testified as follows:

"Q. ALL RIGHT. DID JERRY WAYNE SEWELL CARRY ON A CONVERSATION WITH J. D., JAMES SHERROD?

A. YES, SIR.

Q. AND WERE YOU PRESENT DURING THIS CONVERSATION?

A. YES, SIR.

Q. WAS BUBBA PRESENT DURING THIS CONVERSATION?

A. YES, SIR.

Q. WHAT ABOUT JERRY WAYNE SEWELL, II? WAS HE PRESENT?

A. BACK AND FORTH, YES SIR.

Q. WHERE WAS JERRY WAYNE SEWELL, II BACK AND FORTH TO DURING THE CONVERSATION?

A. WELL, IN THE KITCHEN AND THE BATHROOM. THE LIVING ROOM AND THE BEDROOM WHERE HE WAS AT WAS RIGHT THERE. IT'S LIKE A HALF WALL SEPARATES THEM. HE GOT DRESSED AND HE COME OUT AND GOT HIM SOME COFFEE, WENT TO THE BATHROOM AND HE COME BACK IN THERE.

Q. COULD YOU HEAR A CONVERSATION IN THAT BEDROOM NEXT TO THE LIVING ROOM?

A. YES, SIR" (Vol. 7/19)

However, Jack Rhodes, who also pled guilty to Count I of the Superseding Indictment and testified as a Government witness, remembered the morning differently. When he arrived at the trailer of Jerry Wayne Sewell, he and his companions, Steven Sherrod and James Edwin Sherrod, were offered refreshments and then began their conversation. Jack Rhodes testified as follows:

"Q. WAS JERRY WAYNE SEWELL, SR. PRESENT?

A. JERRY WAYNE SEWELL, SR.? YES, HE WAS.

Q. ALL RIGHT. WAS JERRY SEWELL, II PRESENT?

A. NOT WHEN WE WALKED IN, HE WASN'T. HE WAS IN THE BEDROOM ASLEEP OR LAYING DOWN OR SOMETHING OR ANOTHER.

Q. DID HE EVENTUALLY GET UP?

A. WELL, HE GOT UP AND STARTED EATING BREAKFAST.

Q. WAS DARLENE ROZNOVSKY THERE?

A. YEAH. DARLENE. SHE WAS THE ONE DOING THE COOKING, AND LISA. THEY WERE COOKING, I THINK.

Q. IS THAT LISA ERWIN?

A. THE LAST NAME, I WOULDN'T BE SURE. SO I COULDN'T SAY.

Q. ALL RIGHT. DID JERRY WAYNE SEWELL, SR. AND J. D. SHERROD HAVE A CONVERSATION?

A. YES, THEY DID. THEY HAD A LONG, EXTENSIVE CONVERSATION.

Q. WERE YOU ABLE TO HEAR THAT CONVERSATION?

A. MAYBE A DOZEN WORDS THROUGH THE WHOLE THING. IT WASN'T NOTHING THAT WAS INTERESTING TO ME. THEY'D GET OFF AND TALKED IN THE KITCHEN AT THE TABLE, PRIVATELY. THEN THEY TALKED OUT IN THE OPEN IN THERE FOR A PERIOD OF TIME BUT IT DIDN'T MAKE NO SENSE TO ME WHAT THEY WERE TALKING ABOUT." (Vol. 9/41)

In the scene described by both of these Government witnesses, even Danny Johnson referred to the presence of Jerry Wayne, II differently from others who were continually present. Jerry Wayne Sewell, II was "in and out", "back and forth".

The morning's activities were interrupted by the arrival of a plumber. After the plumber left, Darlene Roznovsky could not remember if she and Jerry Wayne Sewell, II or Glenn ever went out and brought supplies inside. Her testimony was as follows:

"I DONE THIS SO MANY TIMES BEFORE THAT I'M NOT SURE IF THE CHEMICALS WERE EVER BROUGHT INTO THE HOUSE, BUT ME AND EITHER JERRY WAYNE SEWELL, II OR GLENN HAD WENT OUTSIDE

TO GET SOME CHEMICALS AND WE WERE COMING BACK: TO THE TRAILER AND A PLUMBER WAS COMING TO FIX A LEAK UNDER THE HOUSE --

Q. WHAT DID YOU DO AT THAT TIME?

A. WE PUT THE CHEMICALS BACK INTO THE TRUCK AND TRAILER.

Q. AND THEN WHAT HAPPENED, YOU CAME BACK INTO THE HOUSE?

A. YES, I DID.

Q. DID YOU WAIT FOR THE PLUMBER TO LEAVE?

A. YES, WE DID.

Q. DO YOU REMEMBER IF YOU AND JERRY WAYNE SEWELL, II BROUGHT CHEMICALS BACK INTO THE TRAILER?

A. NO SIR.

Q. IF SOMEONE ELSE TESTIFIED THAT IN FACT YOU AND JERRY WAYNE SEWELL, II DID THAT WOULD THAT NECESSARILY BE INCORRECT?

MR. FRY: YOUR HONOR, I'M GOING TO OBJECT TO THAT AS JUST AN ATTEMPT TO BOLSTER THIS WITNESS'S TESTIMONY. SHE CAN ONLY TESTIFY TO WHAT SHE KNOWS.

THE COURT: RESTATE YOUR QUESTIONS, PLEASE.

BY MR. JENKINS:

Q. WOULD IT BE INCORRECT IF SOMEONE TESTIFIED THAT YOU AND JERRY WAYNE SEWELL, II WENT OUT AND RETRIEVED CHEMICALS
THE COURT: WAIT A MINUTE, WAIT A MINUTE. I'LL LET YOU ASK THE WITNESS WHAT SHE DID OR DIDN'T DO BUT IT SOUNDS LEADING TO TELL HER SOMETHING THAT OCCURRED AND ASK HER TO SAY "YES" OR "NO". JUST AS (SIC) HER WHAT SHE DID.

BY MR. JENKINS:

Q. DO YOU REMEMBER WHETHER OR NOT YOU AND JERRY WAYNE SEWELL, II WENT BACK OUT TO THE TRAILER AND EVENTUALLY BROUGHT CHEMICALS BACK IN?

A. NO, SIR.

Q. WHY IS THAT?

A. I HAD BEEN OUT TO THE TRAILER, OUTSIDE IN THE TRUCK, AND LITTLE TRAILER TO GET CHEMICALS AND DRUGS SO MANY TIMES THAT I WILL NOT REMEMBER THE SPECIFIC TIMES.

Q. HAD YOU DONE THAT WITH JERRY WAYNE SEWELL, II BEFORE?

A. YES, BUT IT COULD HAVE BEEN FOR OTHER THINGS BESIDES DRUGS SO I CAN'T REALLY SAY WE WENT OUT SPECIFICALLY TO GET DRUGS.

Q. BUT I'M TALKING ABOUT CHEMICALS, TOO.

A. NO.

Q. COULD YOU HAVE GONE OUT WITH JERRY WAYNE SEWELL, II AND RETRIEVED CHEMICALS AND BROUGHT THEM BACK -

MR. FRY: YOUR HONOR. I'M GOING TO OBJECT TO THAT QUESTION. IT'S BEEN ASKED AND ANSWERED.

THE COURT: IT CALLS FOR HER TO SPECULATE. I'M GOING TO SUSTAIN THE OBJECTION.

BY MR. JENKINS:

Q. SO, DO YOU KNOW WHETHER OR NOT YOU WENT OUT AND OBTAINED CHEMICALS WITH JERRY WAYNE SEWELL, II?

A. NO, SIR.

MR. FRY: YOUR HONOR, I'M GOING TO OBJECT TO THAT QUESTION. HE'S ALREADY ASKED IT AND SHE SAID NO.

THE COURT: SHE TESTIFIED "NO". (Vol. 12-A/86-88)

In testimony, Jack Rhodes remembered the scene as follows:

"Q. DID THEY DISCUSS SOME CHEMICALS, MR. RHODES?

A. RIGHT.

Q. WHAT EXACTLY DID THEY DISCUSS ABOUT THE CHEMICALS?

A. WHAT THEY ALREADY HAD AND WHAT THEY WOULD NEED.

Q. DID J. D. SHERROD EXAMINE ANY CHEMICALS AT THAT TIME?

A. NO. SOMEBODY WENT AND BROUGHT THEM IN. DANNY AND A GIRL BROUGHT SOME IN THERE AND HE LOOKED AT THEM.

Q. ALL RIGHT, LET ME ASK YOU THIS: WERE SOME CHEMICALS EVENTUALLY BROUGHT INTO THE HOUSE?

A. YES, THEY WERE.

Q. AND WHO BROUGHT THOSE IN?

A. THE BEST I CAN REMEMBER, DARLENE AND DANNY JOHNSON AND SOME OTHER INDIVIDUAL. I DON'T KNOW HIS NAME. HE AIN'T IN THIS CASE, THOUGH, BUT HE HELPED BRING IT IN." (Vol. 9/43).

Danny Johnson further testifed about the morning's activities with regard to Jerry Wayne Sewell, II and said that he, Danny Johnson, Jerry Wayne Sewell, II, Jack Rhodes and Steven Sherrod loaded the cadillac with chemicals and boxes and lab equipment. (Vol. 7/23). However, when Government witness, Jack Rhodes, testifed, he stated that when the cars were loaded for the trip from Bells, Texas, to Orange, Texas, that "Darlene and Danny done most of the loading", and that he and Steven Sherrod worked on loading another car. When Jack Rhodes was asked if Jerry Wayne Sewell, II was present, he replied that he was because he had just come back from the store with his girlfriend getting cigarettes. (Vol. 9/45) When asked if Jerry Wayne Sewell, II helped in the loading. Jack Rhodes testified that the best he could remember was that Jerry Wayne Sewell, II came over and looked. (Vol. 9/45)

The Fifth Circuit decided the jury could infer that Defendant-Petitioner knew about the agreement because of his presence at his father's house and also because of the extraneous evidence (objected to at trial) offered against him to show he was familiar with drug activities. These alleged incidents took place far in advance of the period of time alleged in the conspiracy for which he was convicted. What has happened is that Jerry Wayne Sewell, II has been convicted of a conspiracy when there are great gaps in the proof needed. The Fifth Circuit also found that the inconsistent testimony about whether Defendant-Petitioner helped carry boxes was sufficient to

support a finding that he participated in the conspiracy. Therefore, the Fifth Circuit affirmed his conviction and found the elements of the offense proved beyond a reasonable doubt based on the uncorroborated testimony of an informant who admitted to doing drugs during the relevant periods, and on alleged extrinsic offenses which were remote in time to the period of the conspiracy in this case.

The District Court found that Jerry Wayne Sewell, II was a minimal participant in the conspiracy. Appendix, Jerry Wayne Sewell, II, E.

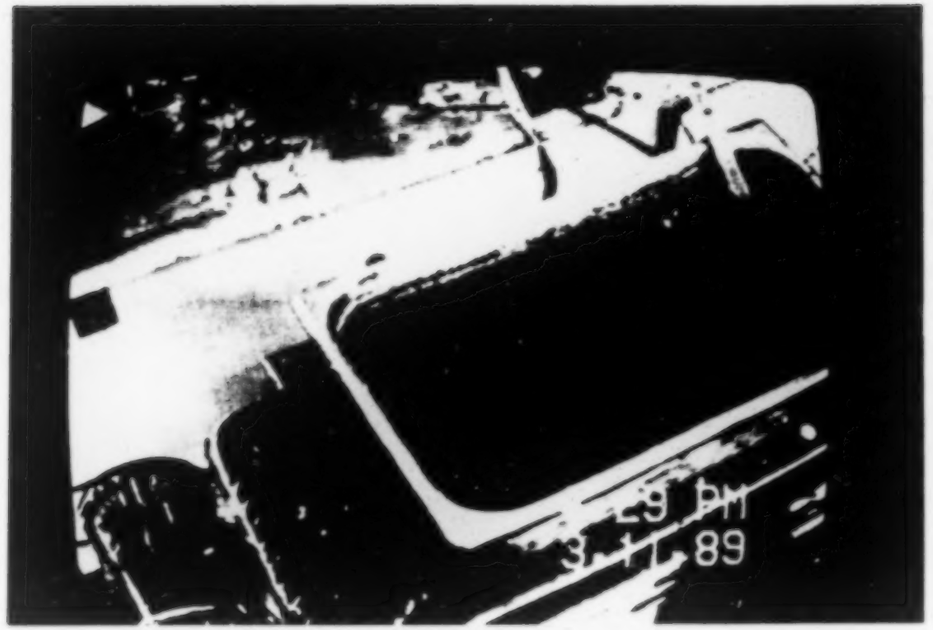
Under the facts of the case and findings of the District Court, it is likely that had Jerry Wayne Sewell, II lived in another circuit, his conviction would not have been upheld. In United States v. Perrone, 936 F.2d 1403, 1410 (2nd Cir. 1991), one defendant, Ramon Emillio Gomez, assisted in loading a van with materials and participated in transporting and unloading them. Supposedly, he did not know the nature of the materials. In Perrone, the Second Circuit indicated that these acts were minimal. A conviction of such a minimal defendant would therefore require "independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy." Perrone, at 1410, quoting United States v. De Noia, 451 F.2d 979, 981 (2nd Cir. 1971). If this test were applied to the facts relevant to Jerry Wayne Sewell, II, where is the independent evidence? The fifth Circuit distinguished Perrone by saying that Gomez was acting in the role of an employee and Defendant-Petitioner was not. No, he was not. He was a son at his father's residence. Considering the paucity of evidence against Jerry Wayne Sewell, II, how then could it be determined that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt?" Jackson v. Virginia, 443 U.S. 307, 309 (1979). The facts and the inferences based on those facts show otherwise. His "in and out", "back and forth" presence is more indicative of innocent movement in his father's

home than of criminal activity, and is just as likely to indicate an attempt to keep away from the persons assembling at his father's home on March 7 and 8, 1989. The evidence at trial showed Jerry Wayne Sewell, II was not a participant in his father's drug endeavors: he did not take to the highways for his father in furtherance of some drug activity; he did not carry drug money around; he did not drive into Oklahoma to get the "cook" or return Jack Rhodes; he did not go to the lab site to watch over things for his father. The lack of evidence of criminal activity is overwhelming.

It is quite likely that more and more people like Gomez from Perrone, or Jerry Wayne Sewell, II from Sherrod, or Clifton Skillern in United States v. Skillern, 947 F.2d 1268 (5th Cir. 1991), who drove his brother to a drug rendezvous, will be caught up in the net that is being thrown out to catch drug conspirators in the War on Drugs. (The Fifth Circuit distinguished Skillern from this case.) To protect not-guilty people when they are caught up in this net, it is necessary for this Court to devise something like a turtle excluder device, to allow them out, much like the Second Circuit has done in Perrone and De Noia by requiring independent evidence that a minimal participant had knowledge of the broader conspiracy.

D. Physical Evidence

Considering the photograph below, which is a still photograph taken off of Government's Trial Exhibit No. 4, a video tape of the lab, in there not a great deal of doubt about the quality and reliability of the evidence brought against all the defendants, including Jerry Wayne Sewell, II, in this case? Look at that pan and its contents and consider the testimony of the DEA Agents. How can it be concluded that the defendants and Defendant-Petitioner, Jerry Wayne Sewell, II, had a fair trial?



CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: October 30, 1992.

Respectfully submitted,

Linda C. Cansler

LINDA C. CANSLER
Attorney for Petitioner,
Jerry Wayne Sewell, II

UNITED STATES of America, Plaintiff-Appellee Cross-Appellant,

v.

James Edwin SHERROD, Defendant-Appellant Cross-Appellee,

and

Steven Lee Sherrod, a/k/a William Wayne Embry and Lonnie Jerrell Cooper, Defendants-Appellants,

Jerry Wayne Sewell, II and Jerry Wayne Sewell, Sr., Defendants-Appellants Cross-Appellees.

No. 90-4467.

United States Court of Appeals, Fifth Circuit.

June 23, 1992.

Defendants were convicted in the United States District Court for the Eastern District of Texas, Richard A. Schell, J., of conspiracy to manufacture, possess and distribute phenylacetone and methamphetamine. On appeal, the Court of Appeals, Garwood, Circuit Judge, held that: (1) sentences were properly calculated; (2) evidence supported finding of amount of drugs involved; (3) indictment was not defective; and (4) denial of severance was not abuse of discretion.

Affirmed.

1. **Criminal Law ⇐1206.3(1)**

Where statute set forth two different penalties for identical violations, defendants were properly sentenced, under rule of lenity, under less severe section. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A, B), as amended, 21 U.S.C.A. § 841(b)(1)(A, B).

2. **Criminal Law ⇐1230**

Guidelines sentence will be upheld if it results from legally correct application of guidelines to factual findings that are not clearly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

3. **Criminal Law ⇐1251**

Failure to increase drug defendant's guidelines range three levels for supervisor/manager status was not abuse of discretion, though defendant acted as chemist in drug manufacturing conspiracy, absent showing that he managed any part of conspiracy. U.S.S.G. § 3B1.1(b), 18 U.S.C.A.App.

4. **Criminal Law ⇐1251**

Increase in drug defendant's guidelines range three levels for supervisor/manager status was supported by evidence that defendant had coordinated set up of illegal drug laboratory. U.S.S.G. § 3B1.1(b), 18 U.S.C.A.App.

5. **Constitutional Law ⇐268(5)**
Criminal Law ⇐662.4, 700(9)

Arresting officers' destruction of methamphetamine and containers found in drug manufacturing lab, other than retained samples, did not deprive defendants of their rights to due process or confrontation; defendants were given ample opportunity to show that government's assertion as to amount of methamphetamine seized was incorrect. U.S.C.A. Const.Amends. 5, 6.

6. **Drugs and Narcotics ⇐133**

Finding as to amount of methamphetamine seized from defendants' laboratory was sufficiently supported by testimony of government chemist who was present at time of search of laboratory, for sentencing purposes, even though chemist's initial estimate at time of search was lower.

7. **Drugs and Narcotics ⇐133**

Drug manufacturing defendants were properly sentenced based on total weight of chemical mixture containing detectable amount of methamphetamine rather than on amount of pure methamphetamine contained in mixture. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A, B), as amended, 21 U.S.C.A. § 841(b)(1)(A, B).

8. **Drugs and Narcotics ⇐46**

Drug Enforcement Agency had authority to designate phenylacetone as Schedule II substance; authority to make such designation was properly delegated by Attorney General. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A, B), as amended, 21 U.S.C.A. § 841(b)(1)(A, B).

9. **Constitutional Law ⇐258(3)**
Drugs and Narcotics ⇐43

Drug defendants convicted of manufacturing methamphetamine were not deprived of due process, though statutory scheme allowed for exemption for manufacturer of over-the-counter product containing methamphetamine; regulatory scheme was not so ambiguous that it failed to give defendants sufficient notice that their activity was deemed criminal, and defendants had made no showing that their product was eligible for exemption or that they had attempted to obtain exemption. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 201(g)(1), as amended, 21 U.S.C.A. § 811(g)(1).

10. **Constitutional Law ⇐250.1(2)**
Drugs and Narcotics ⇐43

Drug defendants' conviction for manufacturing methamphetamine did not violate equal protection, though manufacturer of over-the-counter product containing methamphetamine was exempted from prosecution; medicinal benefit of over-the-counter product, together with its reduced potential for abuse, provided rational basis for exemption. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 201(g)(1), as amended, 21 U.S.C.A. § 811(g)(1); U.S.C.A. Const.Amend. 14.

11. **Conspiracy ⇐43(6)**

Indictment could properly charge single conspiracy even though it alleged multiple objectives, i.e., manufacturing, possessing and distributing illegal drugs; indictment properly charged single conspiracy statute involving objectives prohibited by single substantive statute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, as amended, 21 U.S.C.A. §§ 841, 846.

12. **Criminal Law ⇐622.3**

Burden to show need for severance is on defendant, who must establish that he suffered compelling prejudice that court could not prevent.

13. **Criminal Law ⇐622.2(4)**

Severance is not required where only one conspiracy exists, even if nature of proof in each case differs, so long as court gives sufficient cautionary instructions.

14. **Criminal Law ⇐1166(6)**

Drug conspiracy defendants were not prejudiced by denial of severance; court cautioned jury numerous times to consider evidence as to each defendant separately and form of jury verdict submitted by court strongly reenforced requirement that jury consider each count and each defendant separately.

Gaylyn Cooper, Beaumont, Tex. (Court-appointed), for James Edwin Sherrod.

Steven C. Barkley, Beaumont, Tex. (Court-appointed), for Steven Lee Sherrod.

Linda Cansler, Beaumont, Tex. (Court-appointed), for Jerry Lee Sewell, II.

Kent Adams, Beaumont, Tex. (Court-appointed), for Jerry Lee Sewell, Sr.

Dewey J. Gonsoulin, Beaumont, Tex. (Court-appointed), for Lonnie J. Cooper.

Bob Wortham, U.S. Atty., James O. Jenkins, Paul E. Naman, Asst. U.S. Attys., Beaumont, Tex., Mervyn Hamburg, Dept. of Justice, Washington, D.C., for U.S.

Appeals from the United States District Court for the Eastern District of Texas.

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

GARWOOD, Circuit Judge:

A jury convicted the five defendants-appellants now before this Court of three counts involving, *inter alia*, conspiracy to manufacture and the manufacture of phenylacetone and methamphetamine. We af-

* District Judge of the Western District of Louisiana, sitting by designation.

firm the convictions and sentences of all five defendants.

Proceedings Below

Defendants Jerry Wayne Sewell, Sr. (Sewell, Sr.), Jerry Wayne Sewell II (Sewell II), Lonnie Jarrell Cooper (Cooper), James Sherrod, and Steven Sherrod were charged in a May 1989 superseding indictment.[1] Also charged in this indictment were co-defendants Jack Rhodes (Rhodes), Dan Hill (Hill), Lisa Ervin (Ervin), and Darlene Roznovsky (Roznovsky).[2] The indictment contained three counts: (1) conspiracy to (a) manufacture phenylacetone (P2P), amphetamine, and methamphetamine, (b) possess amphetamine and methamphetamine with the intent to distribute, and (c) distribute amphetamine and methamphetamine; (2) manufacturing P2P; and (3) manufacturing a mixture containing methamphetamine. The conspiracy charge and the charge of manufacturing the methamphetamine mixture alleged enhanced penalty provisions for violations of 21 U.S.C. §§ 846 and 841(a)(1) involving a kilogram or more of a mixture or substance containing a detectable amount of methamphetamine.

Following a jury trial in October and November 1989, defendants were convicted and sentenced on all three counts. They appeal their convictions and sentences on constitutional and evidentiary grounds. The Government cross-appeals the sentences of James Sherrod, Sewell, Sr., and Sewell II, alleging noncompliance with the sentencing guidelines and statutory minimum sentence provisions.

Factual Background

In early 1989, law enforcement officials from the Sheriff's Department of Calcasieu Parish, Louisiana, began working with a confidential informant, Danny Johnson (Johnson),[3] to identify and apprehend individuals involved in drug trafficking in the area. Among the names given to the authorities by Johnson was that of defendant Sewell, Sr.,[4] from whom Johnson had previously obtained methamphetamine. One of the primary goals of Johnson's cooperation with the Calcasieu Parish Sheriff's Department was to locate the laboratory source of Sewell, Sr.'s methamphetamine.

When Johnson first began work as an informant, the law enforcement officials' focus was on Sewell, Sr.'s connections with a source of methamphetamine in San Antonio, Texas, known as "Fred." Because of financial problems with Fred, however, Sewell, Sr. began making arrangements to manufacture amphetamine and methamphetamine independently.

Preparations were begun for making the drugs: several conversations concerning the conspiracy were held in Cooper's auto mechanic shop in Mossville, Louisiana; Rhodes, an associate of Sewell, Sr. from Oklahoma, located a chemist, or "cook";[5] Cooper compiled a list of the chemicals and equipment necessary for the laboratory process; Sewell II and Roznovsky collected equipment and chemicals stored on Sewell, Sr.'s property; Sewell II, Steven Sherrod, and Rhodes helped load the items into Rhodes' car, a 1977 Cadillac, for transport to the laboratory site, which was in a semi-rural area near Orange, Texas.

On March 8, 1989, Johnson, Rhodes, Steven Sherrod, and James Sherrod drove to Dallas in the Cadillac. In Dallas, they met Roznovsky who had gone there to purchase the remaining chemicals and laboratory

1. The original indictment, filed in March 1989, charged these defendants with two counts, neither of which contained an enhanced penalty provision: (1) conspiracy to manufacture P2P, amphetamine, and methamphetamine; and (2) manufacturing P2P.

2. These four co-defendants entered into plea arrangements with the Government. Each testified at trial for the Government, except Hill, who testified for the defense. None of these four are parties to the present appeal.

3. Johnson had agreed to act as a government informant in return for special treatment respecting drug charges pending against him.

4. Johnson also named Ervin, Roznovsky, and Cooper as associates of Sewell, Sr. who were involved in drug dealing.

5. Defendant Steven Sherrod introduced his uncle, defendant James Sherrod, to Rhodes at the beginning of March, 1989. James Sherrod was a chemist in the Dallas area.

equipment. These items were placed in the trunk of the Cadillac, along with the equipment and chemicals that had come from Sewell, Sr. The four men then continued on to Lake Charles, Louisiana, where Johnson had an apartment.

Law enforcement officials, in close contact with Johnson, kept the Cadillac under surveillance and contacted the Texas Department of Public Safety (DPS) to arrange a stop of the vehicle in order to obtain the identity of its occupants.[6] A DPS patrolman stopped the car near Beaumont on the pretext that a tail light was malfunctioning. He ascertained that the occupants were Johnson, Rhodes, and James Sherrod; Steven Sherrod produced false identification giving his name as William Wayne Embry. The DPS officer, as requested by Louisiana law enforcement officers, did not search the car.

Once the four men arrived in Lake Charles, Johnson contacted Cooper to get directions to the laboratory. Cooper arranged to lead them to the laboratory the next morning. The next day, the group met Cooper at a local truck stop and followed him to an auto mechanic shop near Orange, Texas, owned by Hill. The group unloaded the items from the trunk and carried them to the laboratory, which was set up in an old school bus located behind Hill's trailer. The group discovered that one of the laboratory flasks was the wrong size. Sewell, Sr., who had remained in Bells, Texas, sent Roznovsky to Orange with the proper equipment.

James Sherrod began working in the laboratory on March 9. Hill was also there working on a batch of methamphetamine that he had started before the others arrived. Steven Sherrod and Rhodes stayed in Johnson's apartment in Lake Charles. Johnson made several trips to the laboratory to check on things, reporting by telephone to Sewell, Sr. and Cooper and keeping the law enforcement officials apprised of the situation.

The Calcasieu Parish Sheriff's Department, joined by agents from the Drug Enforcement Agency (DEA) and officers from the Orange County police and sheriff departments, maintained a constant surveillance of the Hill property. Early in the morning of March 11, DEA agents obtained a warrant to search the Hill property. The officers planned to wait to execute the warrant until Sewell, Sr. arrived at the laboratory to inspect the finished product. During the afternoon of March 11, however, officers near the laboratory observed Rhodes and Steven Sherrod arrive in the Cadillac, open the trunk of the vehicle, and drive away a few minutes later. Fearing that the defendants were dismantling the laboratory to move it or that Rhodes and Steven Sherrod were removing evidence, officers stopped the Cadillac after it had crossed the state line into Louisiana. Shortly thereafter, the agents executed the search warrant at the laboratory site.

In the school bus, the agents found chemical mixtures in a cake pan, a Coca-Cola syrup canister, and a Mason jar. The agents took samples from each of these containers; tests of these samples revealed methamphetamine.[7] Precursor chemicals were also found in the bus.[8]

At the same time they obtained the search warrant, the agents also obtained from the magistrate issuing the warrant an order permitting them to destroy the chemical mixtures (except for retained samples), provided that photographs were taken of the mixtures and their containers before the destruction.[9] The order did not contain any provision allowing for the destruction of the containers themselves. Nevertheless, the agents at the scene decided to destroy the containers as well because they were contaminated by the hazardous chem-

6. Johnson had identified James Sherrod and Steven Sherrod to the authorities only as the "cook" and the "bodyguard," respectively.

7. The methamphetamine mixtures found were in the process of formation.

8. The DEA agents found 4,750 grams of P2P, a precursor chemical necessary for the manufacture of amphetamine and methamphetamine.

9. Agents participating in the search took still photographs and made a video of the laboratory scene.

ical mixtures.[10] Samples of the mixtures from at least two of the containers were retained, and later tested.

Defendants were arrested and indicted on conspiracy and manufacturing charges.

Discussion

I. Cross Appeal.

The Government cross-appeals the sentences of Sewell, Sr. and Sewell II, contending that the district court erred in applying the statutory minimum penalty provisions of 21 U.S.C. § 841(b)(1)(B) instead of those of section 841(b)(1)(A).[11]

[1] The version of 21 U.S.C. § 841 that was in effect at the time of the offenses set forth two different penalties for identical violations of section 841(a)[12] involving one hundred grams or more of a mixture or substance containing a detectable amount of methamphetamine.[13] Under section 841(b)(1)(A), the penalty for a first-time offender was a term of imprisonment which could not be less than ten years or more than life; for a defendant with two or more final convictions for a felony drug offense, the penalty was "a mandatory term of life imprisonment without release." Section 841(b)(1)(B) provided a penalty for the same violation of a term of imprisonment which could not be less than five years and not more than forty years; if the defendant had a prior final conviction for a drug-related felony, the sentence was for a term of imprisonment not less than ten years and not more than life.

Sewell, Sr. and Sewell II were convicted of manufacturing 17.5 kilograms of a mixture containing a detectable amount of methamphetamine and were sentenced under section 841(b)(1)(B). Sewell II received the statutory minimum sentence of five years' imprisonment on each count, running concurrently. Sewell, Sr. had three prior convictions for drug-related felonies and therefore was subject to the more serious penalty. He received concurrent sentences of 360 months on all counts.

The Government contends that the Sewells should have been sentenced under section 841(b)(1)(A). Under this provision, Sewell II would have received a minimum sentence of ten years and Sewell, Sr. would have received a mandatory life sentence.

Although we would tend to agree with the Government under the current version of the statute, we are unable to do so under the version in effect at the time of the offense. *United States v. Kinder*, 946 F.2d 362, 367–68 (5th Cir.1991) (remanding for resentencing under section 841(b)(1)(B) because the district court violated the rule of lenity). Following *Kinder*, we hold that the district court did not err in sentencing the Sewells under section 841(b)(1)(B).

II. Sentences of Lonnie Cooper and James Sherrod.

The Government also cross-appeals the sentence of James Sherrod, arguing that the district court should have increased his Guidelines range three levels for supervisor/manager status based upon his role as

10. Destruction of the containers was proper according to DEA policy and Environmental Protection Agency guidelines.

11. Only the sentences of the Sewells will be considered in the determination of this issue; the sentences of the other defendants fall within the scope of either subsection.

We note that although many other sections of the 1988 Anti-Drug Abuse Amendments Act did not become effective until March 18, 1989 (120 days after enactment on November 18, 1988), Subtitle N of P.L. 100-690, which added sections 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii), does not contain a provision for delayed effectiveness. A statute that does not provide otherwise becomes effective upon enactment. *United States v. Robles-Pantoja*, 887 F.2d 1250, 1257 (5th Cir.1989). Because there is no provision to the contrary, the amendments under which the defendants were sentenced became effective in November 1988, prior to the conduct for which the defendants were convicted.

12. 21 U.S.C. § 841(a)(1) makes unlawful the knowing or intentional manufacture of a controlled substance.

13. This overlap of penalties was due to a technical error in the 1988 Anti-Drug Abuse Amendments Act, which was corrected by amendment in 1990. Section 841(b)(1)(A) now applies to violations involving one kilogram or more of a substance containing a detectable amount of methamphetamine.

the chemist. *See* U.S.S.G. § 3B1.1(b).[14] Cooper raises the opposite claim, contending that the district court erred in finding him to be a supervisor/manager and in raising his Guidelines level by the required three levels. Cooper contends not only that he was not a manager or supervisor but that he was entitled to a reduction of two to four levels because of his minimal or minor role in the group. *See* U.S.S.G. § 3B1.2.[15]

[2] This Court will uphold the district court's Guidelines sentence if it results from a legally correct application of the Guidelines to factual findings that are not clearly erroneous. *United States v. Ponce*, 917 F.2d 841, 842 (5th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 1398, 113 L.Ed.2d 453 (1991); *United States v. Manthei*, 913 F.2d 1130, 1133 (5th Cir.1990); *United States v. Suarez*, 911 F.2d 1016, 1018 (5th Cir.1990). A finding of fact is not clearly erroneous if it is plausible in light of the record viewed in its entirety. *Anderson v. Bessemer City*, 470 U.S. 564, 573–76, 105 S.Ct. 1504, 1511–12, 84 L.Ed.2d 518 (1985). We review legal conclusions concerning the Guidelines *de novo*. *Manthei*, 913 F.2d at 1133.

[3, 4] After reviewing the record, we conclude that the factual findings made by the district court in this respect were not clearly erroneous. Although James Sherrod, as the chemist, was undoubtedly a necessary member of the conspiracy, the record supports the district court's finding that he did not manage any part of the conspiracy. Likewise, although Cooper claims that he played a minimal or minor role in the conspiracy, the district court's finding that Cooper coordinated the set up of the laboratory is based on ample evidence in the record, and adequately supports the determination that he was neither a minimal nor a minor participant.[16]

Finding no error, we affirm the sentences of James Sherrod and Lonnie Cooper.

III. Issues Related to the Finding that the Conspiracy Involved 17.5 Kilograms.

The defendants raise three issues related to the district court's finding that the conspiracy involved 17.5 kilograms of the methamphetamine mixture. First, they contend that their rights to due process and confrontation were violated because the mixtures (other than retained samples) and containers were destroyed before anyone made an accurate measurement of the amount of the mixture. Second, they claim that the district court erred in finding that the laboratory contained 17.5 kilograms of the mixture. Finally, they argue that the district court should not have sentenced them on the basis of the entire 17.5 kilograms because the mixture contained only a little pure methamphetamine. We reject each of these contentions.

A. Destruction of physical evidence

[5] Each defendant claims he was denied his constitutional rights to due process and confrontation because the Government destroyed the chemical mixtures (other than retained samples) and containers without accurately measuring the mixtures or

14. In determining whether a defendant played a supervisor/manager role in an offense, a court should consider such factors as the exercise of decision-making authority, the degree of participation in planning or organizing the offense, and the degree of control and authority exercised over others. U.S.S.G. § 3B1.1, Application Note 3.

15. Application Note 1 to section 3B1.2(a) defines a minimal participant as one who is "plainly among the least culpable of those involved in the conduct of a group," as indicated by "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others."

A minor participant is one who is "less culpable than most other participants, but whose role could not be described as minimal." Section 3B1.2, Application Note 3.

16. For example, there is evidence that Cooper compiled a list of chemicals and equipment needed at the laboratory, that Cooper called Hill several days before the activity at the laboratory to inform Hill that some people were coming to use the lab, and that Sewell, Sr. instructed Johnson and Roznovsky to keep Cooper informed of the status of the activity at the lab.

allowing the defendants the opportunity to measure them.[17]

This issue has been addressed by a prior panel of this Court in an opinion deciding the appeal of co-defendant Jack Rhodes. *See United States v. Rhodes*, No. 90–4538 (5th Cir. September 27, 1991) [946 F.2d 891 (table)] (unpublished opinion). It is a general rule in this Circuit that one panel may not overrule the decision of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court. *See, e.g., Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991). Thus we are bound to follow the decision in *Rhodes* on issues previously decided.

This Court in *Rhodes* held that the destruction of the methamphetamine and containers did not deprive co-defendant Rhodes of his rights to due process or confrontation. "The process due a defendant who believes that the sentencing information is incorrect is the opportunity to show that the information is materially untrue." *Rhodes*, at p. 4 [946 F.2d 891 (table)] (citing *United States v. Rodriguez*, 897 F.2d 1324, 1328 (5th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 158, 112 L.Ed.2d 124 (1990)).

The defendants were aware long prior to their sentencings that the Government would request sentencing based upon the methamphetamine mixture being in the amount of 17.5 kilograms. The evidence produced by the Government at the trial in October and November 1989 was that the laboratory contained 17.5 kilograms of the methamphetamine mixture. In addition, the presentence reports for each defendant calculated the Guidelines sentencing level using the 17.5 kilogram figure.

The defendants were afforded ample opportunity to attempt to show that the Government's evidence was incorrect. James Sherrod and Hill testified about the quantity of drugs at James Sherrod's sentencing hearing, and James Sherrod testified on this issue again at Sewell, Sr.'s sentencing hearing. Counsel for all defendants were present at both hearings and were given an opportunity to question the witnesses. That the district court obviously found the Government's evidence more credible does not prove a due process violation.

The defendants also were not deprived of their right to confrontation. This right is substantially limited at a sentencing hearing; the district court may even base its findings on out-of-court statements. *Rhodes*, at p. 5 [946 F.2d 891 (table)]; *Rodriguez*, 897 F.2d at 1328. Although the defendants did not choose to make use of the opportunity, they could have called the DEA chemist, George Lester, to the stand at the sentencings to testify regarding the calculations of the volumes of the canister and the pan.

We hold that the destruction of the methamphetamine mixtures (other than the retained samples) and their containers did not deprive the defendants of their constitutional rights.[18]

17. We note that proof of the quantity of drugs involved does not go to guilt or innocence of the section 846 and section 841(a) violations charged, but rather only to the sentence. *See Barnes v. United States*, 586 F.2d 1052, 1056 (5th Cir.1978). Here, the indictment alleged that the quantity involved was more than one kilogram of a mixture containing methamphetamine. *Cf. United States v. Alvarez*, 735 F.2d 461, 468 (11th Cir.1984). There was no real dispute that the mixture involved did contain methamphetamine (the retained samples and the test results were made available to defendants) and that the quantity of the mixture was more than one kilogram; the dispute was whether it was only four or five kilograms or more than seventeen.

18. For due process considerations, see *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 2529, 81 L.Ed.2d 413 (1984) (defendant's due process rights violated only if the evidence destroyed (1) possessed an exculpatory value that was apparent before it was destroyed and (2) was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means); *United States v. Binker*, 795 F.2d 1218, 1230 (5th Cir. 1986) (applying *Trombetta* in the context of destruction of marijuana), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984) (same), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985).

On the issue of the right to confrontation, see *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir.1976) (destruction of a sample of "moonshine" liquor did not deprive a defendant of his Sixth Amendment right to confront witnesses as the Confrontation Clause is restricted to "witnesses" and does not include physical evidence; production of the sample or laboratory notes was not necessary to fully "confront" the government's expert); *United States v. Gordon*, 580 F.2d 827, 837 (5th Cir.) (following *Herndon*), *cert. denied*, 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978).

B. Factual findings of the amount of methamphetamine mixture

[6] The defendants contend that the district court erred in finding that the amount of the methamphetamine mixture found in the laboratory was 17.5 kilograms.

This Court will uphold a district court's findings about the quantity of drugs involved unless they are clearly erroneous. *United States v. Ponce*, 917 F.2d 841, 842 (5th Cir.1990). A clearly erroneous finding is one that is not plausible in the light of the record viewed in its entirety. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

In determining drug quantities, the district court may consider any evidence which has "sufficient indicia of reliability." U.S.S.G. § 6A1.3, comment; *United States v. Manthei*, 913 F.2d 1130, 1138 (5th Cir. 1990). This evidence may include estimates of the quantity of drugs for sentencing purposes. *United States v. Coleman*, 947 F.2d 1424, 1428 (10th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1590, 118 L.Ed.2d 307 (1992). The district court's factual findings of the amount of drugs involved must be supported by what it could fairly determine to be a preponderance of the evidence. *United States v. Thomas*, 932 F.2d 1085, 1091 (5th Cir.1991), *cert denied*, — U.S. —, 112 S.Ct. 887, 116 L.Ed.2d 791 (1992).

All of the Government records created at the time of the arrest and search of the laboratory were based on the DEA agents' estimates that the amounts of the mixtures in the cake pan, Coke canister, and Mason jar totalled 4.5 kilograms. These estimates were not based on any accurate measurements made at the scene, but were conservative guesses of the amounts of the mixtures. The Government's trial evidence, however, was that the laboratory contained 17.5 kilograms of the methamphetamine mixture. This evidence consisted of the testimony of DEA Special Agent Shoquist and George Lester, a chemist for the DEA.[19] Before the trial began, Shoquist obtained and measured the capacity of a standard Coke canister of the kind that had been destroyed. Also, he reworked his estimate of the volume of the cake pan based on measurements of the pan made at the time of the search. Based upon these calculations of the volumes of the cake pan and canister, Lester testified that the methamphetamine mixture found in the laboratory totalled 17.5 kilograms.

Defendants have not overcome their difficult burden of showing that the district court's reliance on the 17.5 kilogram figure was clearly erroneous. Here, the sworn testimony of the two Government agents is a sufficient "indicia of reliability" to support the district court's findings. The district court, after hearing the testimony and viewing all the evidence, found the 17.5 kilogram estimate to be credible. The mere existence of a discrepancy between the original estimate and the evidence introduced at trial does not render the district court's use of the 17.5 kilogram amount clearly erroneous.[20] *See United*

19. Both Shoquist and Lester were present at the time of the search of the laboratory; Lester made the early estimates of 4.5 kilograms.

20. We note in passing that, although the defendants rely vociferously on the apparent discrepancy between the original estimate of 4.5 kilograms and the final calculation of 17.5 kilograms, the effect of the Drug Equivalency Table of the Sentencing Guidelines (as in effect when the offenses were committed; those in effect at sentencing provided a higher base offense level for the same quantity) weakens this reliance.

Because both P2P and methamphetamine were found in the laboratory, the defendants' sentences were calculated by use of the Drug Equivalency Table. The P2P and the methamphetamine were converted into "equivalent" amounts of cocaine, and the total amount of cocaine was used to determine the offense level. If the 4.5 kilogram figure were used, with the 4,750 grams of P2P, the resulting equivalent of 12.95 kilograms of cocaine would establish an offense level of 32. Using the 17.5 kilogram amount of methamphetamine, again with the 4,750 grams of P2P, the total amount of cocaine

States v. Rhodes, at pp. 3–4 [946 F.2d 891 (table)].

We hold that the district court did not err in sentencing the defendants based upon the calculation that 17.5 kilograms of drugs were involved.

C. Purity of the methamphetamine mixture

The defendants contend that use of the 17.5 kilogram figure for sentencing constitutes error because the mixture was not pure methamphetamine, and that the district court should have considered only the amount of methamphetamine that could have been produced.

This Circuit has held that consideration of the total weight of a substance containing a detectable amount of methamphetamine is proper in determining the defendant's sentence. *See United States v. Walker*, 960 F.2d 409, 412 (5th Cir.1992); *United States v. Mueller*, 902 F.2d 336, 345 (5th Cir.1990); *United States v. Butler*, 895 F.2d 1016, 1018 (5th Cir.1989), *cert. denied*, — U.S. —, 111 S.Ct. 82, 112 L.Ed.2d 54 (1990); *United States v. Baker*, 883 F.2d 13, 15 (5th Cir.), *cert. denied*, 493 U.S. 983, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989).

The defendants argue, however, that a recent Supreme Court decision has in effect overruled these cases. *See Chapman v. United States*, — U.S. —, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). In *Chapman*, the Court held that the weight of blotter paper on which LSD was customarily distributed was a "'mixture or substance containing a detectable amount' of LSD," and so was properly considered in determining the proper sentence under the guidelines. *Id.* 111 S.Ct. at 1925. The Court made clear that Congress intended the carrier medium to be included in the entire weight of the mixture to determine the proper sentence. *Id.* at 1924. In making this analysis, the Court noted that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." *Id.* at 1925.

Both the Sixth and Tenth Circuits have addressed this issue in the context of methamphetamine since *Chapman*. *See United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991); *United States v. Fowner*, 947 F.2d 954 (10th Cir.1991) (unpublished opinion), *cert. denied*, — U.S. —, 112 S.Ct. 1998, 118 L.Ed.2d 594 (1992). In *Jennings*, the Sixth Circuit refused to sentence the defendants on the basis of the total weight of a mixture that contained a small amount of methamphetamine and a large percentage of poisonous by-products. 945 F.2d at 136. The court pointed out that methamphetamine is not mixed with other chemicals in order to dilute the methamphetamine and increase the amount of saleable mixture; instead, the defendants "were attempting to distill methamphetamine from the otherwise uningestable byproducts of its manufacture." *Id.* at 137. The court concluded that the district court on remand was limited to sentencing the defendants for the amount of methamphetamine they were capable of producing.

In our recent *Walker* decision, we expressly declined to follow the *Jennings* approach.

The interpretation urged by the defendants and adopted by the Sixth Circuit appears to be inconsistent with the statute, the Sentencing Guidelines, and important passages in *Chapman*.

We note that both the statute and the Sentencing Guidelines distinguish between

is 38.95 kilograms, resulting in an offense level of 34.

The breaking point between levels 32 and 34 is between 14.9 and 15.0 kilograms of cocaine. The 4.5 kilogram figure, which the evidence revealed was clearly a conservative estimate, when converted with the P2P, produces a total amount of cocaine that is only two kilograms (of cocaine) away from the breaking point. Thus, although the defendants point out repeatedly that the 17.5 kilograms is almost four times greater than 4.5 kilograms, the same sentencing increase would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than the original "conservative" estimate.

"pure" methamphetamine and mixtures containing methamphetamine. 21 U.S.C. §§ 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii) each expressly set the same penalties based on possession of a much smaller quantity of methamphetamine *or* possession of a much larger quantity of a "mixture or substance containing a detectable amount of methamphetamine." Similarly, the footnote to the Drug Quantity Table following section 2D1.1 provides that

> "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.... In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater." U.S.S.G. § 2D1.1, Drug Quantity Table (November 1990).

The Drug Table distinguishes between methamphetamine and "pure" methamphetamine.[21]

The *Chapman* Court itself noted the statute's and the Sentencing Guidelines' disparate treatment of methamphetamine *vis-a-vis* other types of drugs:

> "With respect to various drugs, including heroin, cocaine, and LSD, it provides for mandatory minimum sentences for crimes involving certain weights of a 'mixture or substance containing a detectable amount' of the drugs. With respect to other drugs, however, namely PCP or methamphetamine, it provides for a mandatory minimum sentence based *either* on the weight of a *mixture or substance* containing a detectable amount of the drug, *or* on lower weights of *pure* PCP or methamphetamine.... Thus, with respect to these two drugs, Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug. But with respect to drugs such as LSD, which petitioners distributed, Congress declared that sentences should be based exclusively on the weight of the 'mixture or substance.' Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD." *Chapman*, 111 S.Ct. at 1924 (emphasis in original).

After distinguishing between the statutory treatment of LSD and methamphetamine, the Court went on to consider whether Congress intended that the weight of LSD carriers be included for sentencing purposes. It is in this context, after expressly distinguishing the treatment of methamphetamine and PCP, that the Court established its market-oriented analysis. Thus it does not appear that the *Chapman* Court intended its market-oriented analysis to be applied to methamphetamine or PCP, and indeed *Jennings* is the only case that has applied the market-oriented analysis of *Chapman* to methamphetamine.

In an unpublished opinion, the Tenth Circuit affirmed a sentence that was based on twenty-four gallons of a liquid mixture that contained detectable amounts of methamphetamine, but that the defendant claimed was waste. *Fowner*, 947 F.2d 954 (Table case). The court concluded, without citing *Chapman* or *Jennings*, that so long as the mixture contained a detectable amount of methamphetamine, the entire weight of the mixture should be included in calculating the base offense level.[22]

21. The Sentencing Guidelines promulgated in November 1991, although not applicable in this case, have changed the language in the Drug Quantity Table. Instead of referring to Methamphetamine and "Pure Methamphetamine," the Sentencing Guidelines now use the language Methamphetamine and Methamphetamine (actual). This change was probably intended to forestall challenges raised by defendants that their methamphetamine was not "pure" because it was not one hundred percent methamphetamine.

22. The result reached in *Fowner* is also more consistent with other circuit decisions involving mixtures of cocaine. *See United States v. Restrepo–Contreras*, 942 F.2d 96 (1st Cir.1991) (finding that entire weight of cocaine and beeswax statute was to be included for sentencing), *cert. denied*, — U.S. —, 112 S.Ct. 955, 117 L.Ed.2d 123 (1992); *United States v. Mahecha–Onofre*,

[7] We are not faced with a situation where a defendant discards some independently acquired methamphetamine by throwing it into his fishpond or stock tank. Instead, the defendants here were convicted of manufacturing methamphetamine (and phenylacetone or P2P), and conspiracy to do so, and the samples tested by the Government of the mixtures found in the laboratory were in the formative stages of the manufacturing process. These circumstances provide strong support for consideration of the weight of the entire mixture for sentencing purposes.

Following *Walker*, we hold that the district court did not err in sentencing the defendants on the basis of the entire 17.5 kilograms of the methamphetamine mixture.

IV. Delegation Issue.

[8] Two of the defendants contend that the DEA lacked authority to designate P2P as a Schedule II substance.[23] We find no merit in this argument.

These defendants assert that the DEA Administrator's order designating P2P as a Schedule II substance is void because the authority to make such a designation is the non-delegable responsibility of the Attorney General. This argument is precluded by the statute itself: 21 U.S.C. § 871 establishes the propriety of the delegation at issue. Subsection (a) of section 871 provides that the Attorney General "may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice."[24] Section 871 has been in effect without amendment since the original enactment of the Drug Abuse Prevention and Control Act in 1970 and was thus in effect when the DEA Administrator placed P2P on the Schedule II list of controlled substances.

The defendants ignore section 871 and instead rely on *United States v. Spain*, 825 F.2d 1426 (10th Cir.1987), to support their contention. In *Spain*, the Tenth Circuit reversed a conviction for possession of a substance which had been placed on Schedule I by the DEA pursuant to 21 U.S.C. § 811(h), a provision added by the 1984 amendments. The court held that the 1973 delegation[25] to the DEA of the Attorney General's functions under the Drug Abuse Prevention and Control Act of 1970, although previously upheld for section 811(a), did not extend to section 811(h) because of the substantive and procedural differences between section 811(h) and section 811(a). *Spain*, 825 F.2d at 1429.

The designation provision in question here is section 811(e), which grants the Attorney General the authority to add immediate precursors of controlled substances to the list of those already regulated. Although there are no cases deciding the validity of delegation to the DEA under this provision, the Eleventh Circuit upheld the original delegation of authority to the Attorney General in *United States v. Hope*, 714 F.2d 1084 (11th Cir.1983). The court found the discretion created by section 811(e) to be indistinguishable from that created by section 811(a). *Hope*, 714 F.2d at 1087. Even the *Spain* court has upheld the delegation to the DEA of section 811(a) authority. *Spain*, 825 F.2d at 1427.

In addition, a recent Supreme Court decision disapproves of *Spain* and holds that delegation to the DEA of authority under section 811(h) is valid. *Touby v. United States*, — U.S. —, 111 S.Ct. 1752, 1758, 114 L.Ed.2d 219 (1991).

In light of 21 U.S.C. § 871 and the decision of the Supreme Court in *Touby*, defendants' reliance on *Spain* is misplaced. Their argument that the DEA lacked authority to designate P2P as a Schedule II substance fails.

V. Rynal Issue.

The defendants argue that their convictions for manufacturing methamphetamine violate the due process and equal protection clauses because the manufacturer of Rynal, an over-the-counter product containing methamphetamine, is not subject to the same penalties.[26]

21 U.S.C. § 811(g)(1) allows the Attorney General to exclude by regulation "any nonnarcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription." At the time of the defendants' activity, the Attorney General had exempted Rynal from the list of Schedule II substances pursuant to this provision. 21 C.F.R. § 1308.22 (1989 Edition).[27]

[9] Defendants claim that their due process rights have been violated because the statutes create an ambiguity by subjecting them to prosecution while exempting the manufacturer of Rynal. Two unpublished opinions of the Ninth Circuit have rejected this argument in similar contexts. *See United States v. Farmer*, 956 F.2d 1168 (9th Cir.1992) (holding that 21 U.S.C. § 811 and 21 C.F.R. § 1308.22 provide fair notice); and *United States v. Worstell*, 951 F.2d 365 (9th Cir.1991) (rejecting the contention that the regulatory scheme is so ambiguous that it fails to give sufficient notice that certain activity is deemed criminal). Furthermore, the defendants have made no showing that their product is eligible for the exemption or that they attempted to make use of the procedure for obtaining an exemption for their product and were denied.

[10] Defendants contend that their conviction for manufacturing methamphetamine violates the equal protection clause because the manufacturer of Rynal is not similarly prosecuted. Because defendants' situation does not implicate either a suspect classification or the exercise of a fundamental right, the different treatment of defendants and the manufacturer of Rynal is subject only to rational basis analysis. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394-2395, 72 L.Ed.2d 786 (1982). The medicinal benefit of Rynal, together with its reduced potential for abuse, satisfy this review. *See United States v. Worstell*.[28]

We conclude that the defendants' convictions for manufacturing methamphetamine do not violate the due process and equal protection clauses.

VI. Conspiracy Count Issue.

Sewell II claims that the conspiracy count was defective because it alleged multiple criminal objectives and that the district court erred in refusing to dismiss it on that ground.

936 F.2d 623 (1st Cir.) (holding that entire weight of suitcases composed of cocaine bonded chemically with acrylic suitcase material was includable for sentencing purposes), *cert. denied*, — U.S. —, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991); *United States v. Hood*, 956 F.2d 279 (10th Cir.1992) (unpublished disposition) (holding that liquid waste surrounding cocaine base was properly included in determining weight of drug for sentencing purposes). *But see United States v. Elmer Acosta*, 963 F.2d 551 (2d Cir. 1992) (concluding that weight of creme liqueur in which cocaine was dissolved was improperly included in calculating offense level because liqueur was not ingestible); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir.1991) (holding that the term "mixture" in U.S.S.G. § 2D1.1 does not include unusable mixtures of cocaine and liquid waste).

23. Sewell II and James Sherrod raise this issue.

24. Sections 811 and 871 are both part of Subchapter I of Chapter 13 of Title 21. The Administrator of the DEA is an "officer or employee" of the Department of Justice.

25. *See* 28 C.F.R. § 0.100.

26. There is no authority to support defendants' position. The defendants cite two cases that held that the removal of Rynal from the schedules of controlled substances did *not* operate to remove methamphetamine itself. *See United States v. Roark*, 924 F.2d 1426 (8th Cir.1991); *United States v. Housley*, 751 F.Supp. 1446 (D.Nev.1990), *aff'd*, 955 F.2d 622 (9th Cir.1992). Defendants seek to distinguish their claims on the basis that this case concerns substances containing a detectable amount of methamphetamine rather than "pure" methamphetamine. This distinction is irrelevant in the context of the constitutional claims raised by the defendants.

27. Rynal has since been removed from the list of exempted substances. *See* 21 C.F.R. § 1308.22 (1991).

28. Defendants also contend that the order exempting Rynal, 21 C.F.R. § 1308.22 (1989 Ed.), is properly read as exempting all substances containing d1-methamphetamine hydrochloride because the section 811(g)(1) exclusion authority is limited to substance, not products. We do not so read the order, which is plainly limited to the product Rynal, a spray manufactured by Blaine Co. Nothing even remotely similar to Rynal is involved here. The defendants may not use this criminal proceeding to collaterally *expand* the plainly limited exclusion.

The defendants were charged with one count of conspiracy in violation of 21 U.S.C. § 846. The indictment alleged seven objectives of the conspiracy: (1–3) to manufacture P2P, amphetamine and methamphetamine; (4–5) to possess amphetamine and methamphetamine with the intent to distribute; and (6–7) to distribute amphetamine and methamphetamine. Each of the objectives of the conspiracy is prohibited by 21 U.S.C. § 841.

In *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 102, 87 L.Ed. 23 (1942), the Supreme Court held that when there is a single agreement to violate several substantive statutes, the conspirators may not be prosecuted for more than one violation of the general conspiracy statute. This Court has held that a single conspiracy to import heroin could not violate both the general conspiracy statute, 18 U.S.C. § 371, and the statute that specifically prohibits conspiracies to import controlled substances, 21 U.S.C. § 963. *United States v. Mori*, 444 F.2d 240, 245 (5th Cir.), *cert. denied*, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971). Neither holding applies to these facts.

[11] Although count one of the indictment here alleges seven objectives of the conspiracy, the only conspiracy statute charged is section 846. In addition, the only substantive statute implicated is section 841. It is well established that a single conspiracy may have several objectives. *United States v. Elam*, 678 F.2d 1234, 1250 (5th Cir.1982). *See also Frohwerk v. United States*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (1919) (conspiracy is a single crime, no matter how diverse its objects). A single charge may allege violations of more than one drug conspiracy statute. *See United States v. Rodriguez*, 585 F.2d 1234 (5th Cir.1978), *en banc*, 612 F.2d 906 (5th Cir.1980) (finding that Congress intended to permit the imposition of consecutive sentences for violations of 21 U.S.C. § 963 [conspiracy to import a controlled substance] and 21 U.S.C. § 846 [conspiracy to possess with intent to distribute], even though such violations arise from a single conspiracy having multiple objectives)[29], *aff'd sub nom. Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

The defendants here were convicted under a single conspiracy statute involving objectives prohibited by a single substantive statute, and were given cumulative sentences for the conspiracy and the substantive offenses. We hold that the indictment was not defective and that the district court did not err in refusing to dismiss it.

VII. Severance Issue.

Sewell II and James Sherrod claim that the district court erred in refusing to sever their trials and in allowing the Government to introduce evidence of extrinsic acts committed by their co-defendants.

[12, 13] The burden to show the need for severance is on the defendant, who must establish that he suffered compelling prejudice that the court could not prevent. *United States v. Loaiza-Vasquez*, 735 F.2d 153, 159 (5th Cir.1984). Severance is not required where only one conspiracy exists, even if the nature of the proof in each case differs, so long as the court below gives sufficient cautionary instructions. *United States v. Rocha*, 916 F.2d 219, 228 (5th Cir.1990), *cert. denied sub nom. Hinojosa v. United States*, — U.S. —, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991); *United States v. Lamp*, 779 F.2d 1088, 1093–94 (5th Cir.), *cert. denied*, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986). The defendants here were all charged in the same conspiracy. The district court cautioned the jury numerous times to consider the evidence as to each defendant separately.

[14] Generally, the district court may adequately minimize prejudice to a co-defendant from extrinsic act evidence by giving limiting instructions. *See United States v. Parziale*, 947 F.2d 123, 129 (5th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1499, 117 L.Ed.2d 638 (1992); *United States v. Posner*, 865 F.2d 654, 658 n. 1 (5th Cir.1989); *United States v. Prati*, 861 F.2d 82, 86–87 (5th Cir.1988). Such instructions were given in this case.

Finally, prejudice from either the extrinsic act evidence or the failure to grant a severance was limited by the form of the jury verdict submitted by the district court that strongly reinforced the requirement that the jury consider each count and each defendant separately.[30]

We find no error on the part of the district court in refusing to allow a severance or in admitting extrinsic act evidence.

Conclusion

The convictions and sentences of all appellants are

AFFIRMED.

29. *Rodriguez* was overruled by *United States v. Michelena-Orovio*, 719 F.2d 738, 756–757 (5th Cir.1983), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984), to the extent that it held that a defendant's guilt of conspiracy to possess with intent to distribute a controlled substance could not be inferred from the quantity of the substance that the defendant had conspired to import. *Michelena-Orovio* did not change the rule that a defendant may be convicted of violating both drug conspiracy statutes in connection with a single conspiracy.

UNITED STATES of America, Plaintiff-Appellee,

v.

David M. SAKS, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

James Doyle SPRUILL, Defendant-Appellant.

Nos. 91-5568, 91-5572.

United States Court of Appeals, Fifth Circuit.

June 23, 1992.

Defendants were convicted by jury in the United States District Court for the Western District of Texas at San Antonio, Edward C. Prado, J., of one count of conspiracy to defraud the United States and five counts of bank fraud, and they appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) there was sufficient evidence of defendants' intent to defraud banks, and omissions concerning another individual's involvement in loan transactions were material; (2) any error from jury instructions was harmless beyond a reasonable doubt; (3) incriminating statements from prior deposition in civil suit were properly admitted; and (4) defendant's convictions on several counts of bank fraud arising from single scheme to defraud were multiplicitous.

Affirmed in part and vacated and remanded in part.

E. Grady Jolly, Circuit Judge, dissented and filed opinion.

1. **Banks and Banking ⇐509.10**

Term "scheme to defraud" in federal bank fraud statute is not readily defined but includes any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived; requisite intent to defraud is established if defendant acted knowingly and with specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself. 18 U.S.C.A. § 1344(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. **Banks and Banking ⇐509.10**

Financial institution itself, not its officers or agents, is victim of fraud the bank

30. The verdict form had a separate guilty or not guilty answer blank for each defendant as to each of the two substantive counts. As to the conspiracy count, there was first an answer blank as to whether the conspiracy charged was proved beyond a reasonable doubt to have existed; then (conditional on an affirmative answer to that question) separate answer blanks as to each defendant as to whether he was found beyond a reasonable doubt to be a member of the conspiracy, and (if so) then, as to each defendant, which of the seven alleged objectives he intended. All blanks were answered adversely to each of the appellants.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 03 1992
GILBERT E. GANUCHEAU
CLERK

No. 90-4467

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

JAMES EDWIN SHERROD,

Defendant-Appellant
Cross-Appellee,

and

STEVEN LEE SHERROD, a/k/a William Wayne Embry and LONNIE JERRELL COOPER,

Defendants-Appellants,

JERRY WAYNE SEWELL, II and
JERRY WAYNE SEWELL, SR.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Texas

ON PETITIONS FOR REHEARING

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:**

Defendants Jerry Wayne Sewell, Sr. (Sewell, Sr.) and Jerry Wayne Sewell, II (Sewell II) were convicted, along with three co-defendants, of three counts involving, *inter alia*, conspiracy to manufacture and the manufacture of methamphetamine and phenylacetone. We affirmed the convictions in *United States v. Sherrod*, No. 90-4467 (5th Cir. June 23, 1992). Sewell, Sr. and Sewell II now raise several issues in petitions for rehearing. We address these issues fully below and deny the petitions for rehearing.

I. Claims Raised by Sewell, Sr.

Sewell, Sr. argues in his petition for rehearing that the district court erred in calculating his criminal history for the purpose of determining his sentence under the United States Sentencing Guidelines (U.S.S.G.). Specifically, he contends that his three prior convictions, although occurring on different dates, arose out of a common criminal episode and thus should have been

* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

considered a single conviction under the sentencing guidelines.[1] Two of Sewell, Sr.'s prior convictions were for delivery of controlled substances; the third was for delivery of heroin.

U.S.S.G. § 4A1.2(a)(2) (1990)[2] provides that "[p]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history." Cases are related if they "(1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." § 4A1.2, Application Note 3.

Sewell, Sr. did not raise this sentencing issue in his brief on appeal. Absent exceptional circumstances, we will not consider matters raised for the first time in a petition for rehearing. *Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970). It appears from the presentence report and the record of Sewell, Sr.'s sentencing hearing in the present case that the three prior convictions at issue arose from three offenses that occurred on

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[1] In the present case, Sewell, Sr. was sentenced to concurrent terms of 360 months on the 3 counts of conviction. This sentence was based on an offense level of 38 and a criminal history category of VI, which yield a sentencing range of 360 months-life. Sewell, Sr. was considered a career criminal under U.S.S.G. § 4B1.1 because he had at least two prior felony convictions for controlled substance offenses; thus his criminal history category was automatically a VI.

If his prior sentences are considered related and treated as one sentence, he would have a criminal history category of II, which, combined with the offense level of 38, would result in a sentencing range of 262-327 months.

[2] The 1990 version of the U.S.S.G. was in effect at the time the defendants were sentenced in this action.

different dates and were the subject of separate judicial proceedings and sentencings.[3] The fact that all of the convictions concern controlled substance offenses does not render them part of a "common scheme or plan." Even had Sewell, Sr. raised this issue in his brief on appeal, we would find that the district court's sentencing of Sewell, Sr. on the basis of the three prior convictions was not clearly erroneous.

Sewell, Sr. claims that we erred in our determination of the chemical mixture manufactured by the defendants, although it is not entirely clear from his brief in support of the petition for rehearing what errors are alleged. We reiterate (1) that the evidence amply supports the district court's findings that the mixture containing detectable amounts of methamphetamine was in the process of formation; and (2) that the district court did not err in sentencing the defendants on the basis of the amount of the methamphetamine mixture rather than on the amount of pure methamphetamine contained in the mixture. *See United States v. Sherrod*, slip op. at 5709-5711. In addition, we hold that the evidence supports Sewell, Sr.'s conviction of conspiracy to manufacture phenylacetone, amphetamine, and methamphetamine, and of the manufacture of phenylacetone and methamphetamine.[4]

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[3] Sewell, Sr. contends in his petition for rehearing that the three prior convictions stemmed from the same original indictment. This is not sufficient to render the convictions related because they were later separated for trial and sentencing purposes. *See* U.S.S.G. § 4A1.2, Application Note 3.

[4] In his appellate brief, Sewell, Sr. claimed that the evidence revealed a conspiracy to manufacture and the manufacture of amphetamine, not methamphetamine. It is unclear whether he is

II. Claims Raised by Sewell II

Sewell II requests that we address on rehearing an issue that we inadvertently overlooked in our opinion. He contends that the district court erred in denying his motions for acquittal and for new trial on the grounds that the evidence was insufficient to support his conviction.

In weighing the sufficiency of the evidence, we view the evidence in the light most favorable to the government to determine whether the elements of the crime were proved beyond a reasonable doubt. *Glasser v. United States*, 80, 62 S.Ct. 457, 469 (1942); *United States v. Skillern*, 947 F.2d 1268, 1273 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1509 (1992). "The evidence is sufficient to support the conviction if a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *Skillern*, 947 F.2d at 1273. The requisite elements of a drug conspiracy are (1) the existence of an agreement, (2) the defendant's knowledge of the agreement, and (3) the defendant's voluntary participation in the agreement.[5] *United States v. Alvarado*, 898 F.2d 987, 992 (5th Cir. 1990). *See also United*

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rearguing this point in his petition for rehearing. Darlene Roznovsky, a co-conspirator who testified for the government, testified that the conspiracy was to manufacture methamphetamine, and tests performed on the samples of the chemical mixtures found during the search of the laboratory revealed the presence of methamphetamine. We hold that there was sufficient evidence to support the convictions on these grounds.

[5] If Sewell II's conviction of the conspiracy count is upheld, his convictions of the two substantive offenses will also be valid upon the theories of aiding and abetting or conspirators' liability under *Pinkerton v. United States*, 66 S.Ct. 1180, 1183-84 (1946). The district court instructed the jury on both theories.

States v. Stone, 960 F.2d 426, 430 (5th Cir. 1992).

Sewell II does not contest the existence of the conspiracy, only his awareness of and participation in it. "A defendant's knowledge of an illegal agreement and his participation in the scheme may be inferred from the circumstances." *United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990). All inferences and credibility choices are viewed in the light most favorable to the government. *United States v. Harris*, 932 F.2d 1529, 1533 (5th Cir.), *cert. denied*, 112 S.Ct. 270 (1991). A conviction will not be reversed for lack of evidence because the defendant played only a minor role in the conspiracy. *Garcia*, 917 F.2d at 1376.

Evidence at trial regarding Sewell II's awareness of and involvement in the conspiracy was not consistent. It is the role of the jury, and not of this Court, to choose which witnesses to believe. *United States v. Jones*, 839 F.2d 1041, 1047 (5th Cir.), *cert. denied*, 108 S.Ct. 1999 (1988).

The evidence linking Sewell II to the conspiracy includes the following. Danny Johnson, a government informant and witness, testified that Sewell II was present during conversations at Sewell, Sr.'s trailer concerning the preparations for the manufacturing process and that Sewell II helped bring chemicals and supplies from a storage area to load in the car that was going to the laboratory site:

"Q Was there a meeting in the living room [of Sewell, Sr's trailer]?

"A Yes, Sir.

"Q Who all was present during this meeting?

"A There was [Sewell, Sr.], Jack, J.D., Bubba, myself, Darlene and then as it went, then [Sewell II] and big Lisa got up.[6]

"Q When [Sewell II] came out, was he introduced to J.D. and Bubba?

"A Not that I remember. Jack knew [Sewell II].

"Q Pardon me?

"A I don't remember except Jack introduced [Sewell, Sr.] to J.D., Yeah, and Bubba.

"Q All right. Did [Sewell, Sr.] carry on a conversation with J.D., James Edwin Sherrod?

"A Yes, Sir.

"Q And were you present during this conversation?

"A Yes, Sir.

"Q Was Bubba present during this conversation?

"A Yes, Sir.

"Q What about Jerry Wayne Sewell, II? Was he present?

"A Back and forth, yes, Sir.

"Q Where was Jerry Wayne Sewell, II. Back and forth to during the conversation?

"A Well, in the kitchen and the bathroom. The living room and the bedroom where he was at was right there. It's like a half wall separates them. He got dressed and he come out and got him some coffee, went to the bathroom and he come back in there.

"Q Could you hear a conversation in that bedroom next to the living room?

"A Yes, Sir.

"Q What happened during this conversation between [Sewell, Sr.] and J.D. or James Edwin Sherrod?

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[6] Johnson is listing co-defendants Jack Rhodes, James Edwin Sherrod (J.D.), Steven Sherrod, Darlene Roznovsky, and Lisa Ervin.

"A [J.D.] Was talking about what chemicals he needed, the quantity and what he could produce from that amount of chemicals and what he could make, what type of drugs he could make.

". . . .

"Q What happened during the conversation?

"A Well, trying to see what type of -- like [Sewell, Sr.] asked him, 'What do you need?' and J.D., he was rattling off all these different types of chemicals and stuff and he couldn't get a certain chemical, that if he could get some other kind of stuff he could mix it and he would come up with it and [Sewell, Sr.] said, 'Well, I've got some stuff here.' And he had Darlene and [Sewell II] go get it from outsides somewheres, brought it in the house, and go through and see what he had on hand, what J.D. could use.

". . . .

"Q After [Sewell, Sr.] sent [Sewell II] and Darlene Rovznoski (sic) out to get some chemicals and lab equipment, did they come back with some chemicals and lab equipment?

"A Yes, Sir.

"Q What did Darlene and Jerry Wayne Sewell, II do with these chemicals and lab equipment?

"A Set it down in the living room.

"Q Were they in a package, were they in a box, were they in a bag? How were they packaged?

"A Some in boxes and there was some in a plastic garbage like.

"Q Were these various chemicals and pieces of lab equipment removed from the boxes and bags?

"A Yes, Sir.

"Q Were they done so in the presence of Darlene Rovznoski (sic) and Jerry Wayne Sewell, II?

"A Yes, Sir.

". . . .

"Q What happened next after Darlene made this list at the direction of [Sewell, Sr.] and J.D. Sherrod?

"A We went ahead and loaded up the Cadillac with what we were going to bring from the house.

". . . .

"Q What did you load in the Cadillac?

"A Boxes - - one box with some stuff in it with a plastic bag and then our suitcases and things.

"Q Were these the items that Jerry Wayne Sewell, II. And Darlene Rovznoski (sic) had brought in from outside the trailer house?

"A Yes, Sir.

"Q Who helped load these chemicals and boxes and lab equipment into the Cadillac?

"A Jerry Wayne, myself, Bubba and Jack.

"Q When you refer to Jerry Wayne, are you referring to Jerry Wayne Sewell, II?

"A Yes, Sir."

The testimony of co-defendant Jack Rhodes, who testified for the government pursuant to a plea bargain, differs on who brought the chemicals into the trailer house and whether Sewell II helped load the equipment into the Cadillac:

"Q Did J.D. Sherrod examine any chemicals at that time?

"A No, somebody went and brought them in. Danny and a girl brought some in there and he looked at them.

"Q All right. Let me ask you this: Were some chemicals eventually brought into the house?

"A Yes, they were.

"Q And who brought those in?

"A The best I can remember, Darlene and Danny Johnson and some other individual. I don't know his name. He

ain't in this case, though, but he helped bring it in.

". . . .

"Q Did you all load these chemicals anywhere?

"A They were loaded into my car.

"Q Who helped load your car up?

"A Darlene and Danny done most of the loading. I was working on the other car. Me and Bubba was working on the other car.

"Q Did you remember seeing Jerry Wayne Sewell, II there?

"A Yeah, he just came back from going to the store, getting cigarettes, him and his girlfriend.

"Q Did Jerry Wayne Sewell, II help load the car?

"A He came over there and looked and that's the best that I remember. If he done it, I don't remember whether he picked up anything or not. I ain't for sure on that, now.

"Q Do you remember if Jerry Wayne Sewell, II handled any of the chemicals inside the trailer?

"A I'm not for sure whether he did or didn't. Seems like he did but I ain't for positive on that, now."

Another witness for the government, co-defendant Darlene Roznovsky, had still another version of the events at the trailer:

"Q Was Sewell, II and Lisa Payne at the trailer at that time?

"A Yes, they were.

"Q Were they -- would they have been close enough to overhear the conversation?

"A If they had been standing there listening for awhile they would have understood the conversation.

"Q What happened in the living room between Jack Rhodes and Sewell, Sr. and J.D. Sherrod and Bubba Sherrod?

"A They were discussing how to produce methamphetamine and the chemicals and ways they were going to produce it.

". . . .

"Q At some point in time did Jerry Wayne Sewell, Sr. instruct you to obtain some chemicals?

"A Yes, he did.

"Q Tell us about that.

"A I done this so many times before that I'm not sure if the chemicals were ever brought into the house, but me and either Jerry Wayne Sewell, II, or Glenn had went outside to get some chemicals and we were coming back to the trailer and a plumber was coming to fix a leak under the house --

"Q What did you do at that time?

"A We put the chemicals back into the truck and trailer.

". . . .

"Q Do you remember if you and Jerry Wayne Sewell, II, or Glenn ever went back out to the camper and brought chemicals back into the trailer?

"A No, Sir.

"Q If someone else testified that in fact you and Jerry Wayne Sewell, II, did that would that necessarily be incorrect?

"MR. FRY: your honor, I'm going to object to that as just an attempt to bolster this witness's testimony. She can only testify to what she knows.

"THE COURT: Restate your question, please.

"BY MR. JENKINS:

"Q Would it be incorrect if someone testified that you and Jerry Wayne Sewell, II, went out and retrieved chemicals from the camper and brought them back into the trailer?

"THE COURT: Wait a minute, wait a minute. I'll let you ask this witness what she did or didn't do but it sounds leading to tell her

something that occurred and ask her to say 'yes' or 'no.' Just as (sic) her what she did.

"MR. JENKINS: Okay.

"BY MR. JENKINS:

"Q Do you remember whether or not you and Jerry Wayne Sewell, II, went back out to the trailer and eventually brought chemicals back in?

"A No, Sir.

"Q Why is that?

"A I had been out to the trailer, outside in the truck and little trailer to get chemicals and drugs so many times that I will not remember the specific times.

"Q Had you done that with Jerry Wayne Sewell, II, before?

"A Yes, but it could have been for other things besides drugs so I can't really say we went out specifically to get drugs.

"Q But I'm talking about chemicals, too.

"A No.

"Q Could you have gone out with Jerry Wayne Sewell, II, and retrieved chemicals and brought them back --

"MR. FRY: your honor, I'm going to object to that question. It's been asked and answered.

"THE COURT: It calls for her to speculate. I'm going to sustain the objection.

"BY MR. JENKINS:

"q so, do you know whether or not you went out and obtained chemicals with Jerry Wayne Sewell, II?

"A No, Sir."

The inference that Sewell II was aware of the existence of the conspiracy follows from the testimony of both Johnson and Darlene Roznovsky that Sewell II was present during the conspirators'

conversation about the chemicals and equipment needed.

Moreover, the evidence showed that, previously to the charged conspiracy (January-March 1989), Sewell II had participated with his father, Sewell Sr., in dealing in illegal drugs, including methamphetamine. Roznovsky testified that "on occasion" Sewell II participated in sales of methamphetamine arranged by Sewell Sr. Roznovsky also related a trip in March 1988 which she, Sewell Sr., Sewell II and another woman drove from Dallas to San Antonio, where they purchased 150 pounds of marihuana, then all drove to Florida, where it was sold, then drove to Louisiana, from whence Roznovsky and Sewell II drove to near San Antonio with part of the sales proceeds and Sewell II made a payment to one "Fred" and purchased half a pound of methamphetamine. Lisa Ervin testified that in 1988 Sewell II delivered methamphetamine to someone in Oklahoma, and on another occasion rode in the car where chemicals for the manufacture of methamphetamine were thus transported to Oklahoma. All this evidence legitimately bears on Sewell II's knowledge and intent.

Sewell II's participation in the conspiracy is a closer question. Although there is some dispute as to whether he brought in the supplies and helped load them into the Cadillac, we hold that a reasonable juror could choose to believe Danny Johnson's version of the events at the trailer. These acts are sufficient to support a finding that Sewell II was a participant in the

conspiracy.[7]

Sewell II cites two cases to support his claim that, even if he was present during his co-defendants' conversation at Sewell, Sr.'s trailer and even if he did help gather and load supplies, these actions are not enough to support his conviction. These cases are distinguishable. In *United States v. Skillern*, 947 F.2d 1268 (5th Cir. 1991), this Court reversed the conviction of a defendant on grounds of insufficient evidence. The strongest evidence against the defendant was the fact that he drove a co-conspirator to a drug rendezvous and, in all likelihood, overheard the conversation between the co-conspirator and the undercover agent, and was thus in a "suspect 'climate of activity.'" *Skillern*, 947 F.2d at 1273-74. Although the panel deciding *Skillern* was suspicious of the defendant's knowledge of the conspiracy, the speculation that the defendant knew the purpose of the rendezvous before overhearing the conversation was insufficient to sustain the conviction.

In the case before us, it was possible for the jury to infer that Sewell II overheard the conversation concerning the preparations for manufacturing methamphetamine. Under *Skillern*, this alone would be insufficient to support his conviction. But here there is some evidence that Sewell II, following this conversation, was instructed to help gather together the requisite chemicals and supplies, the subject of the foregoing conversation,

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[7] The district court recognized Sewell II's limited role in the conspiracy and reduced his offense level by four levels on the grounds of his minimal participation. U.S.S.G. § 3B1.2(a).

that were stored on Sewell, Sr.'s property, and that he helped load them into a car. A reasonable juror could conclude that, not only was Sewell II aware of the existence of the conspiracy, he had acted voluntarily in furtherance of it.

In *United States v. Perrone*, 936 F.2d 1403 (2d Cir. 1991), a conviction was reversed where

> "the only concrete evidence against [the defendant] was that he assisted in loading a van with materials whose nature he was not shown to have understood, and participated in transporting and unloading them. Such activity was consistent with his normal duties [of employment]."

Perrone, 936 F.2d at 1410. The court found this evidence to be insufficient, applying a test that, in cases where a defendant's involvement is minimal, there must be "'independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy.'" *Id.* (quoting *United States v. De Noia*, 451 F.2d 979, 981 (2d Cir. 1971)).

Here, Sewell II helped to load the chemicals after hearing the conversations concerning their intended illegal use. He was aware of the nature of the items he was handling. Further, his actions were not those of an employee, as in *Perrone*.

See United States v. Garcia, 917 F.2d 1370, 1376 (5th Cir. 1990) (where we held sufficient to support a conspiracy conviction contested testimony that a defendant knew that a vehicle left in his care contained marijuana.)

Although we acknowledge that this may be a close question, we hold that the evidence was sufficient to support Sewell II's conviction.

The petitions for rehearing are DENIED.